TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1903~~ 1904.

No. ~~371~~. 94.

THE UNITED STATES, APPELLANT,

vs.

CHARLES M. THOMAS.

No. ~~375~~. 95.

CHARLES M. THOMAS, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

FILED JULY 26, 1904.

(19025 AND 19026.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 374.

THE UNITED STATES, APPELLANT,

vs.

CHARLES M. THOMAS.

No. 375.

CHARLES M. THOMAS, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Caption	1	1
Petition filed	1	1
Amended petition	1	1
Traverse	8	5
Findings of fact	9	6
Conclusions of law	11	10
Opinion	12	10
Dissenting opinion	19	18
Order for judgment	21	21
Motion for new trial	22	22
Opinion on motion for new trial	23	22
Judgment	25	25
Application of defendant for appeal	26	25
Order allowing appeal	26	25
Clerk's certificate to transcript on appeal	27	26
Clerk's certificate to application for and allowance of cross appeal	28	26
Application of claimant for appeal	29	26
Order allowing cross appeal	29	26

Court of Claims.

CHARLES M. THOMAS
vs.
THE UNITED STATES. } No. 22671.

I. *Petition and amended petition.*

original petition of the claimant was filed November 29, 1901. January 17, 1902, the claimant, by leave of court, filed his amended n in lieu of his said original petition, which is as follows:

Amended petition.

d January 17, 1902, in lieu of original petition filed November 29, 1901.

honorable the Court of Claims:

claimant respectfully represents:

hat he is a captain in the United States Navy, having been com-ed to this rank on March 3, 1899. He originally entered the States naval service on November 28, 1861.

n the 1st day of July, 1899, he was in command of the U. S. S. ster," said vessel being at sea, and so continued in command of ssel at sea until the 2d day of December, 1899, when, by order Secretary of the Navy, he was detached from said command at es, West Indies, by telegraphic orders as follows, viz:

"ST. VINCENT, *30–11, 1899.*

LONG To Capt. THOMAS, 'Lancaster,' St. Vincent:

ached 'Lancaster' proceed Washington reporting Navy Depart-hief Staff Asiatic Station.

"WASHINGTON."

telegraphic order was later supplemented by the following written iz:

'JOHN D. LONG,
"*Secretary.*

NAVY DEPARTMENT,
Washington, November 29, 1899.

'W. A. M.
96041

: You are hereby detached from duty in command of the U. S. ancaster,' will proceed immediately to Washington, D. C., and at the Navy Department, at that place, for special temporary

d yourself in readiness for orders to sea duty.

s employment on shore duty is required by the public interests.

Respectfully,

"(Sgd.) A. S. CROWNINSHIELD,
"*Acting Secretary.*

tain CHARLES M. THOMAS, U. S. N.,
"U. S. T. S. 'Lancaster.'

O.) (Confirming telegram.)

"

He left Barbadoes December 2, 1899, taking passage in the merchant steamer "Wordsworth," and arrived in New York on the 11th day of December, 1899. In obedience to the above orders from the Navy Department at Washington in person on December 12, 1899, and returned the next day to Yonkers, New York, and continued there in accordance with the authority of the Navy Department, and while at Yonkers received the following orders:

"JOHN D. LONG,
"*Secretary.*
"W. A. M.
"199226.

NAVY DEPARTMENT,
Washington, December 13, 1899.

"SIR: Proceed to San Francisco, Cal., thence to Hongkong, taking passage in the steamer sailing from San Francisco on January 6, 1900, and upon your arrival at Hongkong report by cable to the commander in chief of the Asiatic Station for further instructions.

"You are authorized to apply to the army quartermaster,
3 accompanying your application with a certified copy of these orders, for transportation of your baggage, including five hundred pounds of baggage by express.

"Respectfully,

(Sgd.) J. D. LONG, *Secretary.*

"Captain CHARLES M. THOMAS, U. S. N.,
"18 Baldwin Place, Yonkers, N. Y.
"L. D."

"BUREAU OF NAVIGATION,
"NAVY DEPARTMENT,
"*Washington D. C., December 14, 1899.*

"DEAR SIR: Orders have this day been issued to Captain Theodore F. Jewell, detaching him from command of the U. S. S. 'Brooklyn,' upon your reporting as his relief. The commander in chief of the Asiatic Station has been directed to assign you to the command of the 'Brooklyn' as the relief of Captain Jewell, also as chief of staff.

"Your orders to proceed to Hongkong will doubtless have reached you before this. In order to get the full advantage of the mileage under these orders you must purchase your own transportation to Hongkong, and not depend on the Navy agents.

"Yours, truly,

"(Sgd.) A. S. CROWNINSHIELD,
"*Chief of Bureau.*

"Captain CHARLES M. THOMAS, U. S. N.,
"No. 18 Baldwin Place, Yonkers, N. Y.
"L. F. C.

"Admiral Watson has been advised that you will sail Jan. 6, and directed to assign you to command 'Brooklyn.'"

"JOHN D. LONG,
"*Secretary.*

NAVY DEPARTMENT,
Washington, December 14, 1899.

"W. A. M.
"199276.

"SIR: Upon assuming command of the U. S. S. 'Brooklyn,' you will report to the commander in chief of the Asiatic Station for duty as his chief of staff.

"Respectfully,

"(Sgd.) A. S. CROWNINSHIELD,
"*Acting Secretary.*

"Captain CHARLES M. THOMAS, U. S. N.,
"18 Baldwin Place, Yonkers, N. Y."

4 On the 29th day of December, 1899, he left New York for San Francisco, arriving there the 3d of January, 1900. He left San Francisco on the merchant steamer "Gælic" on the 6th day of January, 1900, arriving at Hong Kong, China, on the 6th day of February. By direction of the commander in chief his orders were modified, and he was directed to assume command of the U. S. S. "Baltimore," and the Department's orders for duty as chief of staff were revoked by the commander in chief of the Asiatic Station. He assumed command of the U. S. S. "Baltimore" at Hong Kong, China, on the 7th day of February, 1900, and continued in the command of said vessel in Chinese waters, and their vicinity, until April 17, 1900, when he was detached by proper orders from the command of the U. S. S. "Baltimore," and assumed the command of the U. S. S. "Brooklyn," at Yokohama, Japan. He continued in command of said vessel serving in China and in the Philippine Islands, and in the waters between China and the Philippines and the waters in their immediate vicinity on said vessel until the 4th day of April, 1901, when he was detached from the command of the "Brooklyn" at Manila, Philippine Islands, by proper orders, and left Manila on the merchant steamer "Esmeralda" for Hong Kong, arriving there on the 7th day of April, 1901, and the same day assumed the command of the U. S. S. "Oregon." He has continuously remained in command of the "Oregon" on sea duty since said date and in command of the said vessel and brought that vessel from the Asiatic Station to the United States, arriving at Bremerton in Puget Sound on the 6th day of July, 1901, where he has since remained in command of said vessel at the navy-yard there.

3. The laws governing this pay while engaged in the duty as above set forth are as follows:

5 (1) The Navy Personnel Act of March 3, 1899 (30 Stat. L., 1007), as follows:

"That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army;

"Provided, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty; but this

provision shall not apply to warrant officers commissioned under section twelve of this act."

(2) Revised Statutes, § 1466, giving to a captain in the Navy the relative rank of a colonel in the Army;

(3) Revised Statutes, § 1261, giving the yearly pay of $3,500 to a colonel in the Army; Revised Statutes, § 1262, granting ten per cent of the current yearly pay for each term of five years' service to all commissioned officers; Revised Statute, § 1267, providing that the pay of a colonel shall in no case exceed $4,500 a year.

(4) The act of May, 26, 1900 (31 Stat. L., 211), as follows:

"That hereafter the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and the Territory of Alaska, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law in time of peace."

(5) The act of March 2, 1901 (31 Stat. L., 903), as follows:

"That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the States comprising the Union, and Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace and the time
6 of such service shall be counted from the date of departure from said States to the date of return thereto;

"Provided, That the officers and enlisted men who have served in China at any time since the twenty-sixth day of May, nineteen hundred, shall be allowed and paid for such service the same increase of pay proper as is herein provided for."

4. During the entire period from July 1, 1899 to September 30, 1901, the claimant was paid at the rate of $4,500 a year, being the rate of pay fixed by §§ 1261, 1262, and 1267 of the Revised Statutes, for a colonel of the Army of over twenty years' service, excepting that from December 2, 1899, to January 6, 1900, he was paid fifteen per cent less pay than the above amount in supposed conformity with the act of March 3, 1899, § 13, at the rate of $3,825 a year.

5. He claims that he is entitled from May 26, 1900, to September 30, 1901, for the service stated above under the several acts above cited, to pay at the rate of $4,950 a year, being in excess of the amount paid him. This excess amounts to the following:

From May 26, 1900, to September 30, 1901, sixteen months and five days at the rate of $450 a year	$606. 25
From December 2, 1899, to February 6, 1900, in addition to the above amount, the difference between shore pay and sea pay at the rate of $675 a year for two months and five days .	122. 36
Total	728. 61

6. Under §§ 1578 and 1585, Revised Statutes, all officers while at sea or attached to sea-going vessels are entitled to one ration or commutation therefor at the rate of thirty cents a day. He did not receive any ration or commutation therefor while at sea or attached to a sea-
7 going vessel as above set forth, and claims commutation at the rate of thirty cents a day from the 1st day of July, 1899, to the

30th day of September, 1901, except for the period from December 2, 1899, to February 6, 1900, for which period he makes no claim, the same amounting to $226.50.

7. While traveling under orders as above stated, from Barbadoes to New York, he was paid expenses of transportation and subsistence amounting to $50, but was not paid mileage. The distance between said points is 2,106 miles, and he claims to be entitled, by virtue of the provisions relating to mileage for the Army, under the act of March 3, 1899 (30 Stat. L., 1068), to mileage for the entire distance at the rate of seven cents a mile, amounting to $147.42, less the amount as above stated already paid for traveling expenses, a difference of $97.42.

No other action than as aforesaid has been had on this claim in Congress or by any of the departments.

The claimant is the sole owner of this claim and the only person interested therein; and no assignment or transfer of this claim, or of any part thereof or interest therein, has been made.

The claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States, and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and the claimant believes the facts as stated in this petition to be true. And the claimant claims one thousand and fifty-two dollars and fifty-three cents ($1,052.53).

GEORGE A. & WILLIAM B. KING,
Attorneys for Claimant.

UNITED STATES OF AMERICA, } ss:
U. S. Naval Station, Puget Sound. }

Chas. M. Thomas, being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

CHAS. M. THOMAS.

Subscribed and sworn to before me this 31st day of December, 1901.

[SEAL.]

W. T. BURWELL,
Capt., U. S. N., Commandant
U. S. Naval Station, Puget Sound.

8 In the Court of Claims of the United States, December Term, A. D. 1902.

II. *Traverse.*

CHARLES M. THOMAS
vs.
THE UNITED STATES. } No. 22671.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every

allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.

Filed November 5, 1902.

9 III. *Findings of fact and conclusions of law.*

This case having been heard by the Court of Claims, the court, on the evidence, makes the following

FINDINGS OF FACT.

I.

The claimant entered the United States Navy as an acting midshipman on the 28th day of November, 1861, and has served continuously in the Navy since that date. He became a captain on March 3, 1899, and has since continuously served in that grade.

II.

Claimant was relieved as commanding officer of the "Lancaster" December 2, 1899, and ordered to report to the Navy Department. He reported at the Navy Department December 12, 1899. He was paid during that period at the rate of $3,825 per annum. On December 13, 1899, he was ordered to proceed to Hongkong for duty on the Asiatic Station, and sailed by merchant steamer sailing from San Francisco, January 6, 1900. He reported in obedience to said orders and was assigned to the command of the U. S. S. "Baltimore" February 7, 1900. April 16, 1900, he was detached from the "Baltimore" and ordered to command the U. S. S. "Brooklyn," April 17. On March 26, 1901, he was ordered detached from the command of the "Brooklyn" on reporting of his relief and ordered to the command of the U. S. S. "Oregon." He was detached from the former vessel April 4, and reported on the latter vessel April 7, of which he remained in command until July 6, 1901. On April 5 and 6, 1901, he was traveling from Cavite to Hongkong on the merchant steamer "Esmeralda."

III.

When relieved as commanding officer of the "Lancaster," the vessel was at Barbados, West Indies. The claimant took the merchant steamer "Wordsworth" from Barbados to New York. The distance is 2,106 miles. Transportation was furnished the claimant from Barbados to New York at a cost of $50. No other allowance was made to the claimant for travel between these places.

IV.

From July 1, 1899, to September 30, 1901, the claimant was attached to a seagoing vessel, except from December 3, 1899, to February 6, 1900, and on April 5 and 6, 1901.

V.

From May 26, 1900, until April 4, 1901, the movements of the U. S. S. "Brooklyn," of which the claimant then had command, were as follows, as officially reported by the Bureau of Navigation:

MOVEMENTS OF VESSELS.

Name of vessel and port visited.	Date of arrival.	Date of departure.	Distance sailed.	Remarks.
"BROOKLYN."			*Knots.*	
Hongkong, China	May 5, 1900	May 26, 1900	1,785	Docking and repairs.
Cavite, P. I.	May 28, 1900	June 26, 1900	634	Headquarters on station.
Hongkong, China	June 28, 1900	June 30, 1900	658	Special duty en route to Nagasaki, Japan, for coal.
Nagasaki, Japan	July 3, 1900	July 5, 1900	953	Received 822 tons of coal.
Chefoo, China	July 7, 1900	July 7, 1900	607	Stopped two hours for News of "Oregon."
Off Taku, China	July 8, 1900	Oct. 11, 1900	210	North China relief expedition.
Chefu, China	Oct. 12, 1900	Oct. 12, 1900	556	For wash clothes and provisions.
Nagasaki, Japan	Oct. 14, 1900	Oct. 20, 1900	436	To grant liberty to crew.
Woosung, China	Oct. 23, 1900	Oct. 28, 1900	1,265	To coal ship.
Cavite, P. I.	Nov. 3, 1900	Nov. 17, 1900	65	Headquarters on station.
Olongapo, P. I.	Nov. 17, 1900	Nov. 19, 1900	65	Transporting governor-general of Philippines.
Cavite, P. I.	Nov. 19, 1900	Dec. 8, 1900	361	Headquarters on station.
Iloilo, P. I.	Dec. 10, 1900	Dec. 16, 1900	358	Commission for naval site in the Philippines.
Cavite, P. I.	Dec. 17, 1900	Dec. 22, 1900	65	Headquarters on station.
Olongapo, P. I.	Dec. 22, 1900	Dec. 29, 1900	65	Commission for naval site in the Philippines.
Manila, P. I.	Dec. 29, 1900	Jan. 31, 1901	655	Headquarters on station.
Hongkong, China	Feb. 3, 1901	Feb. 25, 1901	649	For docking and repairs.
Cavite, P. I.	Feb. 27, 1901	Apr. 10, 1901	4,002	Headquarters on station.

10

VI.

From April 7, 1901, until June 12, 1901, the movements of the U. S. S. "Oregon," of which the claimant was then in command, was, as officially reported by the Bureau of Navigation, as follows:

Name of vessel and port visited.	Date of arrival.	Date of departure.	Distance sailed.	Remarks.
"OREGON."			*Knots.*	
Hongkong	Feb. 22, 1901	Apr. 13, 1901	862	Exchanging men.
Off mouth of Yangtsi	Apr. 17, 1901	Apr. 19, 1901	51	Anchored on account of thick weather.
Woosung, China	Apr. 19, 1901	May 5, 1901	1,060	Exchanging men.
Yokohama, Japan	May 11, 1901	May 16, 1901	3,466	Coaling ship.
Honolulu	May 30, 1901	June 4, 1901	2,085	Do.
San Francisco, Cal	June 12, 1901			Transferring ammunition to Mare Island.

VII.

Between December 2, 1899, when relieved as commanding officer of the U. S. S. "Lancaster" and ordered to report to the Navy Department, and February 7, 1900, when he took command of the U. S. S. "Baltimore" at Hongkong, China, he was paid only shore pay, $3,825 a year, 15 per cent less than sea pay; from May 26, 1900, to September 30, 1901, the claimant was paid at the rate of $4,500 a year, except for April 5 and 6, 1901, when he was paid at the rate of $3,825 a year. The rate of $4,500 is the pay fixed by law for a colonel in the Army of over

twenty years' service under sections 1261 and 1262 of the Revised Statutes as applied to the Navy by the act of March 3, 1899 (30 Stat. L., 1007 and R. S., sec. 1466). The rate of $3,825 is 15 per cent less than that amount, the percentage required to be deducted for service on shore in accordance with the act of March 3, 1899.

VIII.

On May 26, 1900, while the claimant was in command of the U. S. S. "Brooklyn," she left Hongkong and went directly to Cavite. While at Cavite she remained in the bay of Manila, off the naval station, about a half mile from Sangley Point and two miles from Cavite.

IX.

On leaving Cavite, on June 26, 1900, the vessel went to Hongkong for diplomatic reasons connected with the disturbed condition of affairs in China. Beside her regular complement of men, she had on board 19 marine officers and a battalion of 300 marines. The vessel then proceeded to Taku, stopping at Nagasaki, Japan, to coal, and at Chefoo to inquire as to the condition of the "Oregon." The anchorage of the "Brooklyn" was about 12 miles off the mouth of the Peiho River in the Gulf of Pechili, it being impossible to approach nearer with so large a vessel, on account of shallow water. The "Newark" was there present on the arrival of the "Brooklyn," and the "Yorktown" and the "New Orleans" arrived later, as well as the dispatch boat "Zafiro," and the "Buffalo." All of the naval powers of the world were represented there by about fifty war vessels, and the presence of the "Brooklyn" there was on account of the Boxer difficulties then existing in north China. The "Brooklyn" cooperated with the army on shore by assisting them to land, providing them with steam tenders and steam launches, and towing them from the anchorage to Tongku. There were frequent conferences on board the "Brooklyn" between the military authorities and the admiral and other officers. General Chaffee boarded the "Brooklyn" on his arrival to consult the commander in chief, and the army quartermaster in charge of transportation was in frequent conference in regard to the facilities for landing the United States troops. The marines on board the "Brooklyn," under Colonel Meade, were landed, and the commander in chief of the naval force went up to Tientsin in person, after the fight at Tientsin, to investigate the condition of the marines there. The officers of the army in passing visited the "Brooklyn" to pay their respects to the commander in chief as the senior military representative of the United States in China, and those of higher rank called to consult him as to the state of affairs on shore. The flagship "Brooklyn" had a representative on shore in connection with the military operations, Lieut. Julian L. Latimer, detailed as a naval aid to General Chaffee, who remained with him for a period of about six weeks. He accompanied him in the expedition for the relief of Pekin, and was present at
11 the capture of Pekin and the retreat of the Chinese forces. His principal duty was to keep the commander in chief thoroughly advised of the state of affairs, and this information was communicated to the Government at Washington by cablegram, through the naval dispatch

boat "Zafiro" carrying all messages to Chefoo. On the return of the "Brooklyn" to Cavite, leaving Taku on October 11, 1900, the vessel stopped at Nagasaki and replenished with coal, going thence to Shanghai, anchoring at Woosung, the man-of-war anchorage for Shanghai, and coaled ship there.

X.

On reaching Cavite, on November 3, 1900, the "Brooklyn" anchored off the city of Manila, where it served as the headquarters of the commander in chief in the Philippine waters. She was used to transport the governor-general of the Philippines for a tour of inspection to Olongapo, keeping on that trip from half a mile to 3 miles from land. She went to Iloilo to permit an inspection by a board ordered by the Navy Department to select a naval station in the Philippines, keeping distant from shore on that trip from an eighth of a mile to 2 miles. She took another trip to Olongapo in connection with the investigation of a naval station, going and returning by substantially the same route as on the former trip. Between these trips, and afterwards until leaving Manila, the vessel remained at headquarters on the station.

XI.

While at Hongkong in February, 1901, the vessel was at the Kowloon dockyard being docked and undergoing minor repairs.

XII.

After the return of the "Brooklyn" to Cavite she became headquarters on the station again in the bay of Manila, and so continued until after March 2, 1901.

XIII.

From June 12, 1901, to September 30, 1901, the "Oregon," of which the claimant remained in command, was at San Francisco, Cal., and at Bremerton, Wash., in the waters of Puget Sound and en route between those two points.

XIV.

At no time between July 1, 1899, and September 30, 1901, did the claimant receive a sea ration or commutation therefor under Revised Statutes, sections 1578 and 1585.

XV.

It has been the practice of the Pay Department to pay officers of the Army serving on board U. S. A. transports the ten per cent increase of pay provided for by act of March 2, 1901, from date of departure from the United States to date of their return to, inclusive.

Since May 26, 1900, army officers serving on army gunboats in the Philippines have been paid the ten per cent increase provided for by the acts of March 2, 1901, and May 26, 1900.

CONCLUSIONS OF LAW.

Upon the foregoing findings of fact, the court decides, as conclusions of law:

1. That the claimant is entitled to recover on Findings III (3) the sum of ninety-seven dollars and forty-two cents ($97.42), being for the travel from Barbados to New York in a merchant steamer, exclusive of the $50 heretofore allowed the claimant for expenses.

2. That the claimant is entitled to recover on Findings V, VI, VIII, IX, XI, XII, ten per cent increase on his pay proper in accordance with the following computation:

Sea pay from May 26, 1900, to April 4, 1901, 10 months 9 days, at $4,500.00 per ammum, $375.00 per month	$3,862.50	
10% additional pay	386.25	
Shore duty pay, 10% additional, less 15% for April 5 & 6, 1901, at $4,207.50 per annum	23.37	
Sea pay from April 7, 1901, to June 12, 1901, 2 months 6 days, at $4,500.00 per annum	825.00	
10% additional pay	82.50	
		$5,179.62
12 Less amount paid:		
Sea pay from May 26, 1900, to April 4, 1901, 10 months 9 days, at $4,500.00 per annum	$3,862.50	
Shore-duty pay for April 5 & 6, 1901, at $3,825.00 per annum	21.25	
Sea pay from April 7, 1901, to June 12, 1901, 2 months & 6 days, at $4,500.00 per annum	825.00	
		4,708.75
Balance		$470.87

being a total recovery of five hundred and sixty-eight dollars and twenty-nine cents ($568.29).

3. That the petition, in respect to all other claims, be dismissed.

BY THE COURT.

IV. *Opinion of the court and dissenting opinion.*

PEELLE, J., delivered the opinion of the court:

The claimant, a captain in the United States Navy, bases his right to recover the pay and allowances of an officer of the Army of corresponding rank, after twenty years' service, under section 13 of the act March 3, 1899 (30 Stats. L., 1007), which, so far as applies to the present case, is as follows:

"SEC. 13. That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the medical and pay corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army:

"Provided, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty. * * *

"Provided further, That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places. * * *

"And provided further, That no provision of this act shall operate to reduce the present pay of any commissioned officer now in the Navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law."

The several claims are stated by counsel in their brief as follows:

1. While traveling under orders from Barbados to New York in December, 1899, he was paid $50 as expenses, but was not paid mileage. He claims mileage at the army rate of 7 cents a mile, less the amount already paid him.

2. Between December 2, 1899, when relieved as commanding officer of the U. S. S. "Lancaster" and ordered to report to the Navy Department, and February 7, 1900, when he took command of the U. S. S. "Baltimore" at Hongkong, China, he was paid only shore pay, $3,825 a year, 15 per cent less than sea pay. He claims sea pay, $4,500 a year, during that time.

3. From May 26, 1900, to March 1, 1901, he was paid sea pay of a captain, at $4,500 a year, and claims 10 per cent increase of this pay for service in the Philippines and in China, under the acts of May 26, 1900, and March 2, 1901 (31 Stat. L., 211, 903).

4. From March 2, 1901, to June 11, 1901, he was paid the sea pay of a captain, $4,500 a year, and claims 10 per cent of this pay for service outside the United States, under the provisions of the act of March 2, 1901 (31 Stat. L., 903).

5. From June 12, 1901, to September 30, 1901, he was paid sea pay at $4,500 a year, and claims 10 per cent increase under the act of March 2, 1901, for service outside the United States. During this time he was in the waters of San Francisco Bay, traveling from San Francisco to Puget Sound, and in the waters of Puget Sound. This claim is made provisionally in case his service in Chinese and Philippine waters is not considered to be service "in China" and "in the Philippine Islands," entitling him to 10 per cent increase from May 26, 1900, to March 1, 1901. In that event he would claim that his service in waters of the United States was beyond the limits of the States comprising the Union. This claim is asserted only as an alternative to the claim for 10 per cent increase during the earlier period.

6. He claims commutation of sea ration under Revised Statutes, sections 1578 and 1585, from July 1, 1899, to September 30, 1901,
13 except from December 3, 1899, to February 1, 1900, and on April 5 and 6, 1901, when he was not attached to a seagoing vessel.

1. In respect to the claim first mentioned, for mileage, it appears from Findings II and III that the claimant, while commanding officer of the U. S. S. "Lancaster" at Barbados, West Indies, was relieved therefrom and ordered to report to the Navy Department. He traveled from Barbados to New York in the merchant steamer "Wordsworth," a distance of 2,106 miles, for which he was furnished transportation at a cost of $50.

He claims mileage under the provisions of the army appropriation act, March 3, 1899 (30 Stat. L., 1064–1068), which reads: "For mileage to officers and contract surgeons, when authorized by law, five hundred thousand dollars: Provided, That hereafter the maximum sum to be allowed and paid to any officer of the Army shall be seven cents per mile, distances to be computed over the shortest usually traveled routes, * * * Provided further, That actual expenses only shall be paid to officers when traveling to and from our island possessions in the Atlantic and Pacific oceans." These provisions the claimant contends are made applicable to him by the provisions of section 13 above quoted.

The claim for mileage, however, is governed by the case of Chauncy Thomas v. United States (38 C. Cls. R., ——), recently decided by this court; and following that decision the claimant is entitled to recover.

2. As to the claim for sea pay while traveling under the order of the Navy Department in a merchant vessel from December 2 to December 12, 1899, such travel being from Barbadoes, the place of his detachment from the U. S. S. "Lancaster," the decision in the case of Ryan v. The United States (38 C. Cls., ——), just decided, is controlling, and following that decision the claimant is not entitled to recover sea pay during such travel subsequent to his detachment from the vessel in which he was performing sea service. Nor is the claimant entitled to recover sea pay while traveling to his post of duty on a merchant vessel from San Francisco to Hong Kong, for the reason that when he was detached from the U. S. S. "Lancaster" he thereby ceased to perform sea service and became entitled to the lower or exceptional rate of pay provided for by the proviso to section 13, and that rate of pay continued until he reached the vessel to which he was subsequently assigned, as "no service shall be regarded as sea service except such as shall be performed at sea under the order of a department and in a vessel employed by authority of law."

3. The claim for 10 per cent increase over and above the rates of pay proper from May 26, 1900, to March 1, 1901, for service in the Philippine Islands and in China, is based on the provisions of the army appropriation acts of May 26, 1900, and March 2, 1901 (31 Stat. L., 211 and 903), the first of which provisions reads: "For additional twenty per centum increase on pay of enlisted men, four million five hundred and twenty-four thousand seven hundred and fifteen dollars: Provided, That hereafter the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the Territory of Alaska shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law in time of peace." * * *

That provision, it will be noted, has reference to the service of
14 the Army in our island possessions, while the provisions of the act of March 2, 1901, have reference to service outside the United States and in China, and read as follows:

"For additional ten per centum increase on pay of officers serving at foreign stations, five hundred thousand dollars:

"Provided, That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the United States comprising the

Union, and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto:

"Provided further, That the officers and enlisted men who have served in China at any time since the twenty-sixth day of May, nineteen hundred, shall be allowed and paid for such service the same increase of pay proper as is herein provided for." * * *

Those provisos the claimant contends are applicable to officers of the Navy by virtue of the provisions of section 13, act of March 3, 1899 (supra). But as the provision of section 13 only makes those statutes applicable to officers of the Navy "when detailed for shore duty beyond seas," at places similar to those where officers of the Army are detailed for duty, it follows that to entitle the claimant to the 10 per cent increase provided for by those acts to officers of the Army, it must be made to appear that the claimant was "detailed for shore duty beyond seas."

This he has failed to do. On the contrary, as shown by Findings VIII to XII, both inclusive, the claimant was in command of the U. S. S. "Brooklyn," a vessel in commission for sea service at the Asiatic Station, and being in commission, with her complement of officers and enlisted men aboard, it matters not what her proximity was to a foreign shore (United States v. Barnette, 165 U. S., 174); and this was correctly the view of the accounting officers of the Treasury Department, for the claimant was paid during that period the higher or sea pay of his grade, as set forth in Finding VII.

But, as this question was passed upon adversely to the claimant's contention in the case of Ryan v. The United States (38 C. Cls. R., —), we need not pursue it further.

4. The claim for 10 per centum increase on the pay proper from March 2 to June 11, 1901, for service "beyond the limits of the United States comprising the Union and the Territories contiguous thereto," is also based on the act March 2, 1901, supra, being the first proviso thereto, as set forth above.

That provision, however, like the preceding one for service in China, is only made applicable to naval officers by the provision of section 13, "when detailed for shore duty beyond seas." As the claimant was serving as commanding officer of the U. S. S. "Oregon," a vessel in sea service, during the period claimed for, he was not doing shore duty, and is not, therefore, entitled to recover.

This question is also disposed of by the ruling in the case of Ryan v. The United States (supra).

5. The claim for 10 per centum increase under said act of March 2, 1901, from June 12 to September 30, 1901, also for service "beyond the limits of the United States comprising the Union and the Territories contiguous thereto," originated, if at all, while the claimant, as shown by Finding XIII, was in command of the U. S. S. "Oregon," a vessel in commission, serving in the waters adjacent to the Pacific coast.

This claim is stated by counsel in their brief as an alternative one. That is to say, if the claimant's "service in Chinese and Philippine

waters is not considered to be service in China and in the Philippine Islands, entitling him to 10 per centum increase from May 26, 1900, to March 1, 1901," then "he would claim that his service in the waters of the United States was beyond the limits of the United States comprising the Union."

The claim for the increase in China and in the Philippine Islands is disposed of adversely to the claimant, both in the Ryan case, supra, and in this case, and we will therefore consider the alternative claim for service in the waters of the United States; i. e., in the waters of San Francisco Bay and Puget Sound, and while en route between San Francisco and Bremerton, Wash.

This service, the claimant contends, was service "beyond the limits of the United States," within the meaning of the act of March 2, 1901, providing "that hereafter the pay proper of all officers and enlisted men serving beyond the limits of the United States comprising the Union and the Territories contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto."

But, as before stated, as that act is only made applicable to officers of the Navy by section 13, act of 1899, "when detailed for shore duty beyond seas" at places similar to those at which officers of the Army are detailed for duty, it follows that such service was not shore duty; nor was it service at places similar to those at which officers of the Army are detailed for duty.

The claimant's service was clearly at sea, as shown by Finding VII, and he was paid, during said period, the sea pay of his grade; and he is not, therefore, entitled to the increase of 10 per centum.

Those cases granting the increase of 10 and 20 per centum on the pay proper of officers and enlisted men in the Army were a recognition by the Congress of the extra hazards attending the service in China and in the Philippine Islands, both by reason of the climatic conditions and the oriental and uncivilized modes of warfare, as well as the contagious diseases common in those countries, with which the land forces had necessarily to come in contact.

These hazards did not apply to the officers and enlisted men of the Navy who were aboard their respective vessels at sea, and therefore to entitle them to the increase within the meaning of section 13 they must show that they were detailed for shore duty in those countries similar to that performed by officers of the Army.

Under this head counsel for claimant also discuss the question as to the basis upon which the 10 per centum increase should be calculated. The acts of May 26, 1900, and March 2, 1901, supra, say: "That hereafter the pay proper of all officers * * * shall be increased 10 per centum."

The question presented, therefore, is as to the meaning of the words "pay proper." That is to say, whether the minimum pay of an
16 officer in the Army, or his minimum pay plus his longevity pay, shall form the basis for calculating the increase of 10 per centum.

But as we have reached the conclusion that the claimant is not entitled to recover the 10 per centum increase provided for by the acts hereinbefore set forth, we refrain from expressing any opinion as to the meaning of the words.

6. The claim for commutation of sea ration under Revised Statutes, sections 1578 and 1585, while attached to a seagoing vessel, is claimed as additional to the allowances provided for by section 13, act of March 3, 1899. Those sections are:

"SEC. 1578. All officers shall be entitled to one ration, or to commutation therefor, while at sea or attached to a seagoing vessel."

"SEC. 1585. Thirty cents shall in all cases be deemed the commutation price of the navy ration."

Prior to the passage of the act of March 3, 1899, all officers of the Navy "while at sea or attached to a seagoing vessel," were entitled to the ration or the commutation price therefor.

The defendant's contention is that by the provision of section 13 those sections of the Revised Statutes are repealed by necessary implication. The provision of section 13 relied upon is: "That, after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

The first and obvious rule of construction invoked by the claimant is that repeals by implication are not favored, and that if the provisions of said sections 1578 and 1585 are not repugnant to said section 13 the statutes should be construed together and effect be given to each.

Counsel on both sides have ably presented their views and cited numerous authorities in support of their respective contentions. The question is one purely of construction, if construction be allowable under the phraseology of the section.

From the increase in the pay of officers of the Navy, as shown by the act of March 3, 1899, the court must assume either that there was some complaint, founded in justice, on the part of the officers of the Navy because their pay and allowances were less than officers of corresponding rank in the Army, or that the Congress, recognizing such inequality, sought to right it. The result was the passage of the act of 1899, by the express provisions of which the officers of the Navy therein classified are given "the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

The question is, What did the Congress mean by the language used? The claimant's contention is: "That the granting of the same pay and allowances operates as a repeal of the old Navy pay and allowances only where the possession of the old Navy pay and allowances is inconsistent with the receipt of the Army pay and allowances." They concede that "in granting Army pay there is an implied repeal of the Navy pay, because there is an inconsistency between the receipt of both Army and Navy pay." And further that "the granting of Army mileage repealed the Navy mileage." But they say "the sea ration is an allowance which is not inconsistent with Army allowances, an
17 allowance for which no substitute is offered by the grant of Army

allowances," and which is "peculiarly appropriate to naval service for which there can not be an Army equivalent."

The act then, it is conceded and rightly so, operates to repeal by implication the prior acts granting pay and mileage to naval officers; and in addition thereto the act of 1899 grants to naval officers the Army allowances for quarters and fuel when on shore, an allowance not theretofore granted to naval officers.

Therefore in these respects it may fairly be said that the inequality in compensation theretofore existing between officers of the Army and Navy were corrected by the act of 1899. That is to say, they are given the "same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

Thus officers of the Navy were not only given the same pay and allowances (except forage) to which officers of the Army were entitled at the time the act was passed, but the act contains a provision making future legislation, in respect to such pay and allowances, applicable to naval officers, thereby indicating the purpose of the Congress to maintain the policy of equality thus established.

The only allowance excepted is for forage, while the only exception in pay is, as set forth in the first proviso, "that such officers, when on shore, shall receive * * * fifteen per centum less pay."

Another significant provision in the section, however, is the last proviso, which reads:

"And provided further, That no provision of this act shall operate to reduce the present pay of any commissioned officer now in the Navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law."

That proviso, though by its terms applicable to the whole act, excepts from the purview of section 13 those commissioned officers of the Navy whose pay would thereby be reduced, and provides that as to them they "shall continue to receive pay according to existing law." And that such officers then in the service, who might thereafter be promoted, should continue to receive the benefit of that provision, the Congress, by the naval appropriation act June 7, 1900 (31 Stats. L., 684–697), provides that "section thirteen of the act approved March third, eighteen hundred and ninety-nine, entitled 'An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States,' is hereby so amended as to provide that nothing therein contained shall operate to reduce the pay which, but for the passage of said act, would have been received by any commissioned officer at the time of its passage or thereafter."

The original proviso to section 13 excepted from the purview thereof the commissioned officers "now in the Navy" whose "present pay" was thereby reduced, while the amendment thereto extends the exception so as to apply to the pay such officers may receive thereafter in case of promotion to higher grades.

We have thus pointed out the exceptions which we think material to aid us in ascertaining the meaning of section 13 as applicable to the present case. That is to say, the exception to Army allowance is forage; the exception to Army pay is when on shore, and then to guard against

reducing the pay, then being received, section 13 excepts from
8 the operation of the act those officers whose pay would thereby be reduced and expressly permits them to "continue to receive pay according to existing law."

If the Congress intended to continue the naval ration, it would seem that the place so to express it would have been in the proviso, wherein such officers are protected against any reduction of their old navy pay.

The words "same pay and allowances" would seem to indicate that the Congress intended, except as therein provided, to conform the pay and allowances of the commissioned officers of the line of the Navy and of the Medical and Pay corps to the pay and allowances of "officers of corresponding rank in the Army." Had the word "allowances" been omitted from the section, there would be much force in the claimant's contention. But the act embraces both subjects and the language justifies the conclusion that the act was intended as a new system for both pay and allowances.

The words "same pay and allowances, except forage," can mean but one thing, and that is that, after June 30, 1899, the commissioned officers of the line of the Navy and of the Medical and Pay corps "shall receive the same pay and allowances, except forage," as now is or may hereafter be provided by law "for the officers of corresponding rank in the Army."

Certainly those words would not be satisfied by giving naval officers less pay and allowances than therein provided for, nor would they be satisfied by giving them more, except as therein expressly provided for. It was to guard against giving them less pay than they were then receiving that the proviso was added, but we find no such provision saving to them the naval ration.

While, on the other hand, the acceptance of navy pay, when higher than army pay, does not operate to deprive such officers of the other provisions of the section granting them army allowances when on shore, and this, we think, materially strengthens the views we have expressed herein, i. e., that all the pay and allowances to which such officers are entitled, except as therein provided, are embraced in the act of 1899.

To hold that the words "same pay and allowances" are inconsistent with prior acts granting pay and mileage to naval officers, though consistent with the act granting an allowance for a ration, would be drawing a distinction without a difference. The words "same pay and allowances" embody a new system applicable to naval officers and must have a meaning independent of the prior acts covering the same subjects, except in those particulars as therein specially provided. That is to say, to continue the sea ration to naval officers, there must be added to the words "same pay and allowances" another proviso to the effect that such officers shall, in addition thereto, continue to receive the ration provided for by a prior act. To add those or equivalent words would be legislation.

Therefore, in the absence of some such provision all the pay and allowances to which officers of the line of the navy, and of the Medical and Pay corps, are entitled, except as therein expressly provided, are covered by the language in the purview of the section.

The word "same" means identical, not different or other, and to put a different construction on the language used would be a violation of the

well-known rule that where the language is free from ambiguity it is not allowable to interpret it.

While the rule is well established that where there are two acts on the same subject effect should be given to both if possible, yet the further equally well-established rule is "if the two are repugnant in any of their provisions, the later act, without any repealing clause, operates, to the extent of the repugnancy, as a repeal of the first; and even where the two are not in express terms repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." (United States v. Tynen, 11 Wall., 88, 92, and authorities cited therein.)

The act of 1899 covers the whole subject of pay and allowances to the officers of the Navy embraced in the purview of section 13, among which is the provision, new to naval officers, for army allowances for quarters and fuel as provided by Revised Statutes, section 1270, made applicable to naval officers by said section 13 when on shore.

The present case seems to come fairly within the decision last cited. Section 26, act of 1899, being the last section thereto, provides: "That all acts and parts of acts so far as they conflict with the provisions of this act are hereby repealed."

We therefore reach the conclusion that sections 1578 and 1585, granting to naval officers while at sea a ration, are inconsistent with and repugnant to the act of 1899, substituting army pay and allowances for the pay and allowance theretofore allowed to officers of the Navy, and being repugnant to said act of 1899 they are, if not by the express provision of section 26, above cited, necessarily repealed by implication.

The claimant is entitled to recover the sum of $97.42 for mileage, but the petition in respect to all other claims is dismissed.

19 Nott, Ch. J., dissenting:

The declared purpose of the navy personnel act is, in its own words (section 13), "That, after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army." Complaints had existed for fifty years that a discrimination was shown by Congress against the Navy, and by this statute Congress determined that the two arms of the service should thenceforth be treated precisely alike; that the pay of the Army and the pay of the Navy should be one and the same thing. It was inevitable that in the application of army law to naval services doubts should arise, but in the application of the statute the statute has given us one plain rule for guidance, and that is that the pay of army officers and navy officers in like official circumstances shall be precisely alike, save one exception hereafter to be named.

For more than one hundred years the pay of the Navy had been a thing by itself, both in fact and in legislation. (Act March 27, 1794, 1 Stat. L., p. 351.) By this navy personnel act all provisions relating to the pay of the Navy have been swept from the statute book. When we want to know what pay a naval officer should receive we must turn

to the provisions regulating army pay to see what the pay of an officer of relative rank may be; and when the statutes fixing and regulating navy pay became obsolete all the distinctions and forms and terms of navy pay became obsolete with them. If the nomenclature of the two arms of the service had been the same, all that the statute need to have said would have been, "Henceforth the pay of the officers of the Navy shall be the same as that of officers of the Army."

The controlling purpose of the navy personnel act being to make navy pay and army pay identical, it becomes the controlling principle by which the statute should be interpreted. The end always to be attained is that the pay of an officer of the Navy shall be the same as the pay of an officer of the Army of relative rank in the same official circumstances. Only one exception of pay is made by the statute. It relates to the detached service of shore duty and is contained in a proviso to the enacting clause, which is in these words: "*Provided*, That such officers when on shore shall receive the allowances, but 15 per centum less pay, than when on sea duty." Allowances and the 15 per centum therefore are alternative—when an officer is not entitled to the one he is entitled to the other.

But this does not mean that every time when an officer sets his foot on dry land he shall be docked 15 per centum of his pay. The proviso gives the officer the "allowances" of army officers—i. e., the allowances of army officers on duty. The next proviso, which is an amplification of the first, expressly uses the term "shore duty," declaring that "when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places." Unquestionably what is meant by the first proviso is that when officers are on detached service on shore and entitled to allowances they shall be docked 15 per cent of the army pay. Why the statute makes this discrimination against officers of the Navy is not apparent.

To clearly understand this proviso we must understand the condition of army officers "in similar circumstances."

When an army officer in the line is with his command he shares the chances of his battalion or regiment or company. If the regiment is in tents, he is in a tent; if the regiment bivouacs in the open air, he bivouacs in the open air; if the regiment is in a fort, he takes such of the officers' quarters as he can get. But when the officer is placed on detached service by proper authority he becomes entitled to quarters or commutation of quarters. It is not every officer absent from his regiment who is entitled to quarters or commutation of quarters, but only such as are placed on detached service by proper authority. When the officer is on detached service he is entitled to commutation, and when he is entitled to commutation it is because he is on detached service.

By analogy, the naval officer on board ship shares the comforts and hardships of those on board; when he is detached from his ship and assigned temporarily to another vessel he there shares the comforts and hardships of those on board. But when he is placed on the detached service of "shore duty" he becomes entitled on the one hand to all the allowances of an army officer on detached service, except forage, and, on the other hand, loses 15 per cent of his regular ordinary pay. By

the same analogy he is not entitled to these allowances unless he is placed on detached service by the proper authority, and, conversely, he does not lose 15 per cent of his pay until he is entitled to the benefit of the allowances.

20 As the army pay became the pay of the navy when navy pay was abolished, so the different kinds of army pay become the pay of naval officers when the conditions of their official duty require a departure from regular or active service pay. Ordinary pay, longevity pay, staff pay, leave-of-absence pay, and waiting-orders pay of the Army become the ordinary pay, the longevity pay, the staff pay, the leave-of-absence pay, and the waiting-orders pay of naval officers.

It is a well-known and established principle in military affairs that an officer assigned to duty by an order issued by proper authority remains charged with that duty and subject to that order until it is superseded by another. But there may be an interregnum between the moment when an officer is relieved from one duty before he is assigned to another, and during that interregnum he is said to be awaiting orders.

In the present case there was such an interregnum consisting of a single day. But that fact can not affect the result, for by the Revised Statutes (section 1265) army officers "waiting orders, shall receive full pay."

I come now to the consideration of the present case, or rather to one part of the present case—the pay of Captain Thomas when in transit from the command of a vessel on the Atlantic seaboard to the command of a vessel in Asiatic waters.

This ordinary pay of a naval officer in the performance of ordinary naval duties has been designated as his "regular or normal" pay. It is the regular or normal pay of an officer for two reasons: First, because it is pay for the performance of the ordinary normal duties of a naval officer; and, second, because it is prescribed by the enacting clause of the statute. When Congress were dealing with ordinary pay for ordinary duties they did so by prescribing the standard of pay in the enacting clause; but when they were dealing with the exceptional services of naval officers detached from their vessels and assigned to shore duty they put the legislation in the form of a proviso—that is to say, they made it an exception to the general rule for naval pay—that is to say, the exceptional pay is for shore service. Of the proviso it should be held—as was held long ago in the case of the United States v. Dickson (15 Peters, 141–165)—that it "carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof." Therefore, to bring the claimant within the terms of the proviso it is incumbent on the defendants to show that the claimant was "detailed" for duty on shore.

The general principle which should govern such cases is that where a naval officer is once assigned to the "regular or normal" duty of a sailor (service on shipboard) he remains entitled not to "sea pay," but to the regular or normal pay of an army officer of relative rank, unless he is by proper authority assigned to the exceptional service of shore duty.

What are the facts in this case?

The facts are that an officer serving on a vessel on the Atlantic station was ordered to report to the Navy Department; that he reported December 12, 1899; that on the 13th he was ordered to proceed to Hongkong for duty on the Asiatic station; that he crossed the continent and sailed by merchant steamer from San Francisco; that he reported to the commanding officer and was immediately assigned to the command of the "Baltimore." The service which he performed can not be regarded as constructively shore duty. He traveled from one vessel to another partly by land and partly on merchant steamers; but that was not shore duty. The orders to come and go in effect precluded him from performing shore duty, and certainly gave him no right to allowances. In other words, it does not appear that the defendants have done what the decision in United States v. Dickson says it is incumbent on them to do—they have not shown that the officer was performing duty on shore, and they have not shown that he was assigned to duty on shore, and therefore they have not brought him "within the terms of the proviso."

21 For some reason not disclosed to the court the Department wished to confer with this officer and ordered him to come to the Navy Department. No duty was assigned to him there. He reported at the Department on one day and was ordered to proceed to the Asiatic station on the next day. He had not been detailed to shore duty when he mounted the steps of the Navy Department and reported to the Secretary. If it was not shore duty to go up the steps of the Navy Department under the first order, I can not perceive why it was shore duty to go down again under the second, there having been no intermediate order of assignment to duty. Certainly the status of this officer continued unchanged until the Department changed it. But no new duty was assigned to him and no change of status was effected. Under the orders he gained nothing in allowances and lost nothing in pay.

It must also be noted that any other rule of construction will embarrass the Secretary of the Navy in the administration of his duties. It is undoubtedly always the right, and often the duty, of the Secretary of the Navy to confer personally with naval officers. In this instance he may have wished to obtain information concerning the vessel or fleet on the Atlantic station; or he may have wished to give the officer informal oral instructions concerning movements on the Asiatic station; or he may have wished to see personally and form some estimate of this officer's intelligence or prudence. If the Secretary of the Navy can not call an officer into his office to confer with him without changing his legal status he will be loath to do so. Certainly such a conference for the information of the Secretary, for the good of the Navy, for public considerations, for no advantage or benefit to the officer, should not be required at his expense.

My conclusion is that this officer not having been "detailed" for "shore duty," and not having been entitled to "allowances" was not liable to be deprived of 15 per centum of his pay.

And thereupon, to wit, on the 5th day of January, 1903, the court ordered judgment to be entered in favor of the claimant in the sum of ninety-seven dollars and forty-two cents ($97.42).

Subsequently, to wit, on the 9th day of March, 1903, the claimant, by his attorneys, filed a motion for a new trial, as follows:

22 V. *Motion for new trial filed March 9, 1903.*

Now comes the claimant, by his attorneys, and moves the court to set aside the judgment rendered in this cause on the fifth day of January, 1903, whereby his petition in respect to all claims other than for mileage was dismissed, and grant a new trial, and in support of this motion assigns the following grounds:

1. Error of law in the disallowance of his claim for an increase of ten per cent on his pay proper from May 26, 1900, to March 1, 1901, while serving in the Philippine Islands and China.

2. Error of law in the disallowance of ten per cent increase on his pay proper from March 2, 1901, to June 11, 1901, while serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto.

3. Error of law in the disallowance of sea pay while traveling under orders on a merchant steamer.

GEORGE A. and WILLIAM B. KING,
Attorneys for Claimant.

23 VI. *Opinion of the court, and order.*

This motion was argued and submitted and on the first day of June, 1903, the court filed the following opinion and order:

PEELLE, J., delivered the opinion of the court:

The question in this case now arises on the claimant's motion for a new trial on the grounds:

1. Error of law in the disallowance of his claim for an increase of 10 per cent on his pay proper from May 26, 1900, to March 1, 1901, while serving in the Philippine Islands and China.

2. Error of law in the disallowance of 10 per cent increase on his pay proper from March 2, 1901, to June 11, 1901, while serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto.

3. Error of law in the disallowance of sea pay while traveling under orders on a merchant steamer.

In the former opinion in this case (38 C. Cls. R., —) the right of the claimant to the 10 per cent increase in his pay proper under the acts of May 26, 1900, and March 2, 1901 (31 Stats. L., 211 and 903), was made to depend upon the second proviso to section 13, act March 3, 1899 (30 Stats. L., 1007), and that ruling is made the basis in part for the motion for a new trial.

Section 13, act of 1889 (supra) reads:

"Section 13. That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army:

"Provided, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty. * * *

"Provided further, That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places. * * *

"And provided further, That no provision of this act shall operate to reduce the present pay of any commissioned officer now in the Navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law."

The Army appropriation acts of May 26, 1900, and March 2, 1901 (supra), read:

"For additional twenty per centum increase on pay of enlisted men, four million five hundred and twenty-four thousand seven hundred and fifteen dollars: Provided, That hereafter the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the Territory of Alaska shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law in time of peace.

"For additional ten per centum increase on pay of officers serving at foreign stations, five hundred thousand dollars:

"Provided, That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the United States comprising the Union and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto.

24 "Provided further, That the officers and enlisted men who have served in China at any time since the twenty-sixth day of May, nineteen hundred, shall be allowed and paid for such service the same increase of pay proper as is herein provided for." * * *

It will be observed that the provisions of the act of May 26, 1900, have reference to the services of officers and enlisted men of the Army in Cuba and in our island possessions, while the provisions of the act of March 2, 1901, have reference to such service outside the United States and in China.

The claimant's contention is that the acts granting the 10 per cent increase of the pay proper of such officers and enlisted men is made applicable to the commissioned officers of the line of the Navy and of the Medical and Pay corps by the enacting clause of section 13 of the act of 1899, above quoted. That clause provides that such naval officers "shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

The acts granting the 10 per cent increase to officers of the Army are based on their "serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the Territory of Alaska," and "beyond the limits of the United States comprising the Union and the Territories of the United States contiguous thereto," and in China since May 26, 1900.

As the primary purpose of those acts was to grant to officers and enlisted men in the Army 10 per cent increase on condition of their service in China, Cuba, and the territorial possessions named, the court in its

former opinion labored under the belief that to entitle naval officers to such increase it was incumbent upon them to show that they had, in the language of the second proviso to section 13, been "detailed for shore duty beyond seas;" that is to say, to entitle naval officers to the 10 per cent increase it was held that they must perform shore service beyond seas at places similar to those where officers of the Army were detailed for duty.

The proviso preserves to naval officers when so detailed "the same pay and allowances" as that given to officers of the Army for like service, and hence when a naval officer is detailed "for shore duty beyond seas" he is entitled to the sea pay of his grade. This was the view taken in the former decision, but the court went further and held that such increase did not attach to the pay of naval officers while performing sea service in the waters adjacent to those islands or in the Chinese waters, and herein, the claimant contends, lies the error of the court in respect to such increase in pay.

The simple question, therefore, is: Do the acts granting the 10 per cent increase apply to naval officers while performing sea service in those waters? Clearly, the purpose of the enacting clause of section 13 was to assimilate the pay of naval officers to army pay, and that is accomplished in the language of the clause, by giving them "the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army." The only exception there stated is that the allowances shall not include forage.

The claimant's services for which he claims the 10 per cent increase were rendered on the U. S. S. "Brooklyn" and "Oregon" (vessels in commission) in the Chinese and Philippine waters in cooperation with the land forces of the United States, and the claimant thereby rendered valuable services to the Government.

On a review of this case we reach the conclusion that for the services rendered by the claimant in those waters he is entitled to the increased pay provided for. This, however, does not include the services rendered by the claimant in cruising along the Pacific coast between San Francisco and Bremerton.

Nor does it apply in this case from the date of the claimant's departure from the United States, January 6, 1900, as at that date neither of the acts granting the 10 per cent increase had been passed, but as the claimant did not return to the United States until after the act of March 2, 1901, he is entitled to the benefit of the 10 per cent increase under that act until his return to the United States, June 12, 1901.

The question as to the basis upon which the 10 per cent should be computed was considered in the case of Irwin (38 C. Cls., R., —), and we there held that the term "pay proper" included longevity pay, and upon that basis the claimant herein is entitled to have the 10 per cent increase computed.

25 And for the reasons stated in the former opinion, following the case of Chauncey Thomas (38 C. Cls., R., —), the claimant is entitled to travel pay from Barbados (where detached from the U. S. S. "Lancaster") to New York, a distance of 2,106 miles, at the rate of 7 cents per mile, under the army appropriation act, March 3, 1899 (30 Stat. L., 1064, 1068), providing that "hereafter the maximum to be

allowed and paid to any officer of the Army shall be seven cents per mile, distance to be computed over the shortest usual traveled routes, * * * Provided further, That actual expenses only shall be paid officers when traveling to or from our island possessions in the Atlantic and Pacific oceans."

As that act making an allowance for mileage is made applicable to naval officers by the enacting clause of section 13, aforesaid, the claimant is entitled to recover thereon, less the sum of $50 which was allowed him by the accounting officers as expenses, leaving due him the sum of ninety-seven dollars and forty-two cents ($97.42) on this item.

For the reasons given the motion for a new trial is allowed as to the 10 per cent increase for services rendered in the Asiatic waters, from May 26, 1900, to June 12, 1901, but for the reasons stated in the former opinion is overruled as to the sea pay claimed while traveling under the order of the Navy Department in a merchant vessel.

Order:

The former judgment is set aside and judgment is now entered on the findings heretofore filed in the sum of five hundred and sixty-eight dollars and twenty-nine cents ($568.29).

BY THE COURT.

VII. *Re-formed judgment of the court.*

CHARLES M. THOMAS
vs.
THE UNITED STATES. } No. 22671.

At a Court of Claims held in the city of Washington, on the first day of June, A. D. 1903, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the claimant, Charles M. Thomas, do have and recover of and from the United States the sum of five hundred and sixty-eight dollars and twenty-nine cents ($568.29).

BY THE COURT.

26 VIII. *Application for and allowance of appeal.*

CHARLES M. THOMAS
vs.
THE UNITED STATES. } No. 22671.

From the judgment rendered in the above-entitled cause on the first day of June, 1903, in favor of the claimant, the defendants, by their Attorney-General, on the 29th day of June, 1903, make application for, and give notice of, an appeal to the Supreme Court of the United States.

LOUIS A. PRADT,
Asst. Attorney-General.

Filed June 29, 1903.

Order: Let the appeal be allowed.

C. C. NOTT,
Chief Justice.

July 2, 1903.

27 Court of Claims.

CHARLES M. THOMAS
vs.
THE UNITED STATES. } No. 22671.

I, John Randolph, assistant clerk of the Court of Claims, certify that foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusions of law filed by the court, of the opinions of the court and the dissenting opinion, of the final judgment of the court of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 9th day of July, A. D. 1903.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk, Court of Claims.

28 Court of Claims.

CHARLES M. THOMAS
vs.
THE UNITED STATES. } No. 22671.

I, John Randolph, assistant clerk of the Court of Claims, certify that the annexed is a true transcript of the application of the claimant for and the allowance of an appeal from the judgment of this court in favor of the said claimant to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 20th day of July, A. D. 1903.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk, Court of Claims.

29 In the Court of Claims.

CHARLES M. THOMAS
v.
THE UNITED STATES. } No. 22671.

The United States having appealed from the judgment rendered in favor of this claimant on the first day of June, in the year 1903, for the sum of five hundred and sixty-eight dollars and twenty-nine cents ($568.29), now comes the claimant, Charles M. Thomas, and hereby appeals to the Supreme Court of the United States from so much of said judgment as disallows the remainder of his claim, and hereby makes application for an allowance of this appeal.

(Signed) GEORGE A. & WILLIAM B. KING,
Attorneys for Claimants.

Filed July 13, 1903.
J. R.

Let the above appeal of the claimant be allowed.

(Signed) C. C. NOTT,
Chief Justice.

July 15, 1903.

(Indorsement on cover:) File No. 19025. Court of Claims. Term No. 374. The United States, appellant, vs. Charles M. Thomas; and File No. 19026. Term No. 375. Charles M. Thomas, appellant, vs. The United States. Filed July 28th, 1903.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, APPELLANT,
v.
CHARLES M. THOMAS. } No. 374.

CHARLES M. THOMAS, APPELLANT,
v.
THE UNITED STATES. } No. 375.

MOTION TO ADVANCE.

The Solicitor-General respectfully moves the court to advance these causes, and in support of the motion suggests the following grounds:

The questions involved relate to the construction of the act of Congress approved March 3, 1899, commonly known as the Navy Personnel Act (30 Stat. L., 1004).

These are test cases affecting the current rate of pay of most of the officers of the Navy who are serving in vessels outside the waters of the United States.

As the present rate of pay of these officers is in doubt until these cases are decided, both the pay

officers of the Navy and the accounting officers of the Treasury are interested in the early settlement of the question. The large number of officers, generally in active service, who are affected by the cases also seems to present a strong reason for prompt hearing and determination.

Counsel for the claimant, Charles M. Thomas, concurs in this motion.

It is suggested that the cases be set down for argument in January or early in February.

HENRY M. HOYT,
Solicitor-General.

O

In the Supreme Court of the United States

October Term, 1904

THE UNITED STATES, APPELLANT,
v.
CHARLES R. FROST. } No. 34

CHARLES M. TROTTER, APPELLANT,
v.
THE UNITED STATES. } No. 35

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

[illegible]

In the Supreme Court of the United States.

THE UNITED STATES, APPELLANT, v. CHARLES M. THOMAS. } No. 94.

CHARLES M. THOMAS, APPELLANT, v. THE UNITED STATES. } No. 95.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On November 29, 1901, Charles M. Thomas, a captain in the United States Navy, filed his original petition in the court below, and afterwards, on January 17, 1902, filed an amended petition, alleging certain services as such captain in the Navy, and claiming that the same entitled him to an increase of 10 per cent on his pay proper under the acts of May 26, 1900 (31 Stat. L., p. 211), and of March 2, 1901 (31 Stat. L., p. 903). There is a further question as to the basis of computation of the said 10 per cent increase in case the court should hold the claimant entitled to such increase.

6576—04——1

There is also an additional claim for full sea pay for services rendered by claimant between December 2, 1899, when the officer was relieved as commander of the U. S. S. *Lancaster*, at Barbados, West Indies, and February 7, 1900, when he took command of the U. S. S. *Baltimore*, at Hongkong, China, and also on the 5th and 6th days of April, 1901, when in transit on a merchant steamer between Cavite, Philippine Islands, and Hongkong. Other matters at issue between the claimant and the Government, which both parties deem settled by the judgment of the court below, are therefore not at issue here. The various claims presented to this court for its consideration are as follows:

Between December 2, 1899, when the claimant was relieved as commanding officer of the U. S. S. *Lancaster* and ordered to report to the Navy Department, and February 7, 1900, when he took command of the U. S. S. *Baltimore* at Hongkong, China, he was paid only shore pay, $3,825 a year, the same being 15 per cent less than sea pay. He claims sea pay at the rate of $4,500 a year during that time.

From May 26, 1900, to March 1, 1901, he was paid sea pay of a captain at the rate of $4,500 a year, and he claims 10 per cent increase for services in the Philippines and in China, under said acts of May 26, 1900, and March 2, 1901. From March 2, 1901, to June 11, 1901, he was paid sea pay of a captain, $4,500 a year, and he claims 10 per cent increase for services outside the United States under the provisions of the act of March 2, 1901. From June 12, 1901, to September 30, 1901, he was paid sea pay at the rate of $4,500

a year, and he claims 10 per cent increase, under the act of March 2, 1901, for services outside the United States. During this time he was in the waters of San Francisco Bay, traveling from San Francisco to Puget Sound, and in the waters of Puget Sound. This last claim is provisional, in case his services in Chinese and Philippine waters are not considered to be service "in China" and "in the Philippine Islands," entitling him to 10 per cent increase from May 26, 1900, to March 1, 1901. In case the court should allow the increase of 10 per cent, as contended for by claimant, then there is the question as to the basis of computation of such 10 per cent increase. Claimant's counsel contend that the increase, where allowed, should be computed upon the full maximum pay to which the officer is entitled, including longevity pay; in other words, that the term "pay proper" means the entire pay, including the longevity increases, and that the 10 per cent of increase, if allowed, should be computed on said entire or maximum pay, including the longevity increase. The Government's contention is that the per cent of increase, if allowed, should be based upon the normal or minimum pay of the grade, and not upon the "current yearly pay," which includes increase of pay for length of service.

The cause was heard in the court below, and on the 5th day of January, 1903, the court dismissed the petition in all respects, except as to a claim for mileage. Subsequently the claimant's counsel filed a motion for a new trial, alleging various errors of law, and on the

1st day of June, 1903, the former judgment was set aside and judgment entered on the findings in favor of the claimant in the sum of $568.29. (See record, p. 25.) From the judgment so entered the United States takes this appeal, except as to that part of the judgment on claim for mileage, the Government now conceding that claimant is entitled to the mileage for which he contended. The judgment of the court below was in favor of the Government on the issue of sea pay while claimant was traveling between points, and from this judgment the claimant files his cross appeal. The findings of the court are set forth in the record, pages 6 to 9, inclusive.

ASSIGNMENT OF ERRORS.

The appellant assigns the following errors in the judgment of the Court of Claims:

1. The court erred in holding that the claimant is entitled to 10 per cent increase on any amount whatever.

2. The court erred in holding that the term "pay proper" includes longevity pay, and in holding that the computation of the 10 per cent increase should be made upon the full maximum pay, including longevity pay.

ARGUMENT.

In determining the various issues involved it will be necessary to consider the following statutes:

Section 13 of the so-called "navy personnel act" is as follows:

> SEC. 13. That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers

of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army: *Provided*, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty, but this provision shall not apply to warrant officers commissioned under section twelve of this act: *Provided further*, That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places: *Provided further*, That naval chaplains, who do not possess relative rank, shall have the rank of lieutenant in the Navy, and that all officers, including warrant officers, who have been or may be appointed to the Navy from civil life shall, on the date of appointment, be credited, for computing their pay, with five years' service. And all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed: *And provided further*, That no provision of this act shall operate to reduce the present pay of any commissioned officer now in the Navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay ac-

cording to existing law: *And provided further*, That nothing in this act shall operate to increase or reduce the pay of any officer now on the retired list of the Navy.

(30 Stat. L., p. 1007.)

Section 1466, Revised Statutes, in fixing the status of officers of the Navy with reference to officers of the Army, and commonly termed "assimilated rank," provides as follows:

> The relative rank between officers of the Navy, whether on the active or retired list, and officers of the Army shall be as follows, lineal rank only being considered:
>
> The vice-admiral shall rank with the lieutenant-general.
>
> Rear-admirals with major-generals.
>
> Commodores with brigadier-generals.
>
> Captains with colonels.
>
> Commanders with lieutenant-colonels.
>
> Lieutenant-commanders with majors.
>
> Lieutenants with captains.
>
> Masters (afterwards lieutenants of junior grades) with first lieutenants.
>
> Ensigns with second lieutenants.

Section 1556 of the Revised Statutes, in fixing pay, emoluments, and allowances for commissioned officers and warrant officers on the active list of the Navy, provides in part as follows:

> The commissioned officers and warrant officers on the active list of the Navy of the United States, and the petty officers, seamen, ordinary seamen, firemen, coal heavers, and employees in the Navy shall be entitled to

receive annual pay at the rates herein stated after their respective designations:

* * * * *

Captains, when at sea, four thousand five hundred dollars; on shore duty, three thousand five hundred dollars; on leave, or waiting orders, two thousand eight hundred dollars.

Section 1261 of the Revised Statutes, in fixing the pay for the respective officers of the Army, provides in part as follows:

SEC. 1261. The officers of the Army shall be entitled to the pay herein stated after their respective designations:

The General: Thirteen thousand five hundred dollars a year.

Lieutenant-general: Eleven thousand dollars a year.

Major-general: Seven thousand five hundred dollars a year.

Brigadier-general: Five thousand five hundred dollars a year.

Colonel: Three thousand five hundred dollars a year.

Lieutenant-colonel: Three thousand dollars a year.

Major: Two thousand five hundred dollars a year.

Section 1262 of the Revised Statutes provides:

There will be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum on their current yearly pay for each term of five years of service.

In the statute, section 1466, Revised Statutes, fixing the status of officers of the Navy with reference to officers of the Army, it is seen that captains in the Navy rank with colonels in the Army. Under old navy pay captains received, when at sea, $4,500; on shore duty, $3,500. The fourth proviso of section 13, navy personnel act, prohibits the reduction of naval officers' pay received at the time of the passage of said navy personnel act. Therefore captains who were in the Navy at the time of the passage of said act, although ranking with colonels, continued to receive old sea pay as provided in said section 1556, Revised Statutes.

In the act of May 26, 1900, making appropriation for the support of the Regular and Volunteer Army for the fiscal year ending June 30, 1901, Congress provided in part as follows:

> For additional twenty per centum increase on pay of enlisted men, four million five hundred and twenty-four thousand seven hundred and fifteen dollars: *Provided*, That hereafter the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the Territory of Alaska, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law in time of peace. (See 31 Stat. L., p. 211.)

In the act passed March 2, 1901, entitled, "An act making appropriation for the support of the Army for the fiscal year ending June 30, 1903," Congress provided in part as follows:

Provided, That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the States comprising the Union, and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto:

Provided further, That the officers and enlisted men who have served in China at any time since the twenty-sixth day of May, nineteen hundred, shall be allowed and paid for such service the same increase of pay proper as is herein provided for. (See 31 Stat. L., p. 903.)

The provisos of May 26, 1900, and March 2, 1901, do not relate to pay in general of army officers, hence the opening clause of section 13 of the navy personnel act has no application thereto.

It will be observed that the statutes quoted from the acts of May 26, 1900, and March 2, 1901, respectively, are *army appropriation acts*, and make provision for extra or increased pay for *particular officers* of the Army serving in *particular places*, and are not applicable to officers of the Army generally nor to the officers serving at any points without the places mentioned in the statutes.

Before the claimant can in any way be affected by these statutes it is necessary that they be construed as such legislation on the question of pay, as was foreseen and contemplated by that part of section 13 of the Navy

personnel act, which provides that officers of the Navy shall "receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

Inasmuch as the statutes relate to Army officers serving in specific and particular places, designated and pointed out in the acts, and do not refer to officers of the Army in general, we contend that the statutes are not such legislation as was contemplated by the opening clause of said section 13.

We contend that the navy personnel act, in placing officers of the line of the Navy upon the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for officers of corresponding rank in the Army was intended by Congress to apply only to a *general law affecting all officers of the Army regardless of the place they may serve* and had reference to the regular compensation of officers of the Army generally as distinguished from any extra pay, allowances, or compensation that might be granted to *particular or specific officers serving in specific and designated localities.*

The law affecting the pay of all officers of the Army is found in sections 1261 and 1262 of the Revised Statutes, which sections provide for the salary of all officers of the Army, including longevity pay.

The effect of the opening clause of said section 13 is to give officers of the Navy the same pay and allowances, except forage, as are provided by the general law found in sections 1261 and 1262, Revised Statutes,

affecting all officers of the Army. And in case any future law should be passed by Congress modifying or repealing the general law as found in said sections 1261 and 1262, fixing the compensation for *all officers of the Army*, then the pay of officers of corresponding rank in the Navy would, as provided by the opening clause of section 13, be correspondingly affected, regardless of the place or condition of service.

But the statutes relied upon by claimant simply grant 10 per cent increase to that *part of the officers of the Army* serving in specific places designated in the statutes, and therefore they can not reach or affect naval officers performing regular sea duty, even though that sea service may be performed in waters adjacent to the land where the specific army officer is located who receives the 10 per cent increase by reason of said statutes.

In seeking to ascertain the meaning of any statute the student first looks to the words and language employed, and "if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument," then the statute is said to "interpret itself," and needs no further interpretation. It is only where the language used is ambiguous and doubtful that it is permissible to look elsewhere for the meaning of the legislators than to the language employed in the statute.

The word "Army," used in the opening clause of said section 13, in its ordinary and usual sense means the Army as a unit, the same usual and ordinary meaning that the word has in the Constitution of the United

States, which makes provision that "the President shall be Commander in Chief of the Army and Navy of the United States." It means the land forces of the United States taken as a single whole and has not the restricted sense of any one department or division of the Army distinct from the whole United States land forces. It does not mean that part of the Army engaged in the Philippines, China, or elsewhere. The President is not limited to be Commander in Chief of the army serving in the Philippines or China, nor to that part of the army serving in Porto Rico, Cuba, Hawaii; nor is he limited as commander in chief to that part of the Army "serving beyond the limits of the States comprising the Union and Territories of the United States contiguous thereto," but he is the commander in chief of the Army of the United States. Hence we insist that the word "*Army*" as here used is synonymous with the words "*the entire land forces of the United States*," and it is undoubtedly in this sense Congress intended the word to be understood. We contend, then, that a fair and intelligent interpretation of the first paragraph of section 13 of the Navy personnel act is, that only such *general statutes* as affect the pay of *all the officers of the Army* could affect the pay of the officers of the Navy; and if a general law concerning the pay of *all officers of the Army* should be passed whereby pay of *all officers of the Army* would be increased or diminished, then the pay of Navy officers of corresponding rank would be increased in accordance therewith.

LEGISLATIVE CONSTRUCTION.

Should the court be in doubt as to the meaning of the first paragraph of section 13, when considered in connection with the statutes granting the 10 per cent increase to army officers, then it is permissible to ascertain that meaning, if possible, from the various acts of Congress subsequently passed relative to the pay of the Army and Navy. The general tenor of subsequent legislation on the question of pay for the Army and Navy seems to lead to the inference that Congress did not intend naval officers doing sea service to receive the 10 per cent increase for which claimant brings this action. In making appropriations for the naval service for the fiscal year ending June 30, 1902, which act was passed March 3, 1901 (see 31 Stat. L., p. 1107), just one day after the passage of the act making appropriation for the support of the Army, Congress said, under the head of a proviso on page 1108 of said Statutes at Large:

> That officers of the Navy, and officers and enlisted men of the Marine Corps, who have been detailed, or may hereafter be detailed, for shore duty in Alaska, the Philippine Islands, Guam, or elsewhere, beyond the continental limits of the United States, shall be considered as having been detailed for "shore duty beyond seas," and shall receive pay accordingly, with such additional pay as may be provided by law for service in island possessions of the United States.

It will be observed in reading the foregoing statute that *enlisted men* of the Marine Corps, as well as certain officers, shall receive the additional pay provided by

law for service in island possessions of the United States. Section 1612 of the Revised Statutes provides as follows:

> The officers of the Marine Corps shall be entitled to receive the same pay and allowance, and the enlisted men shall be entitled to receive the same pay and bounty for reenlisting, as are or may be provided by or in pursuance of law for officers and enlisted men of like grades in the infantry of the Army.

The last quoted statute is similar to and indeed almost in like terms as the first paragraph of section 13 of the Navy personnel act. It places *enlisted men* of the Marine Corps upon the same pay as is or may be provided by or in pursuance of law for the *enlisted men* of like grades in the infantry of the Army. Now, if claimant's contention is correct, enlisted men in the Marine Corps when serving in Chinese and Philippine waters should receive the additional 20 per cent provided for by the statutes giving the increase of 20 per cent to enlisted men in the Army, and this they would receive without any further legislation. But enlisted men in the Marine Corps doing duty in Philippine and Chinese waters were not paid the same increase as provided by the statutes for the enlisted men in the Army, and Congress, in order to place them in a like position when doing duty similar to the enlisted men in the Army, made a special provision in the statute of March 3, 1901, whereby they should receive pay corresponding with that of the enlisted men of the Army when doing shore service. The enlisted man in

the Marine Corps receives the additional 20 per cent by reason of the express statute giving it to him, and then only when doing shore duty, and does not receive any increase on his pay when performing duty in the nature of sea service. If it were necessary to pass a special statute providing that the marines should receive the increase provided in the army appropriation acts, and this, too, despite of the fact that the marines were placed upon the same pay as the enlisted men of the Army by the general statute found in section 1612, it would seem that naval officers under the opening paragraph of section 13 of the navy personnel act would not be entitled to the 10 per cent increase except by a special statute. And Congress recognized this in the second proviso of the navy personnel act. Therefore we may justly conclude that had it been the intention of Congress to place officers doing sea service on 10 per cent increase of their pay it would have expressly stated that intention in the act of March 3, 1901.

Section 1569 of the Revised Statutes provides as follows:

> The pay to be allowed to petty officers, excepting mates, and the pay and bounty upon enlistments of seamen, ordinary seamen, firemen, and coal heavers in the navy service shall be fixed by the President: *Provided*, That the whole sum to be given for the whole pay aforesaid, and for the pay of officers and for the said bounties upon enlistments, shall not exceed, for any one year, the amount which may be in such year appropriated for such purposes.

It will be seen by the foregoing statute that the President and not Congress fixes the pay of enlisted seamen and ordinary seamen in the naval service. The number of seamen, ordinary seamen, firemen, coal heavers, and sailors in the naval service whose pay is fixed by the President now approximates 30,000 men. A very large portion of these have been doing service in Philippine waters, Chinese waters, and in other waters beyond the continental limits of the United States. No increase of pay has been fixed by the President for these men corresponding with the increase of pay fixed by Congress for the enlisted men in the Army doing service in the Philippine Islands and in China. Neither could the President grant a corresponding advance of pay for services of these seamen, for the reason that Congress made no provision or appropriation whatever whereby the increase if fixed by the President could be paid to the ordinary seamen. Had Congress intended the special provisos in the acts of May 26, 1900, and March 2, 1901, granting extra pay to officers of the Army, to be such legislation as was contemplated in the opening paragraph of section 13, and that the officers of the Navy would receive increased pay by reason of such legislation, it certainly would not have discriminated against the large number of seamen, sailors, and petty officers who manned the ships that were commanded and under the orders of the naval officer who is contending for his 10 per cent increase.

It would seem that Congress should have made some provision granting a greater appropriation in order that

the President might increase the pay of the common sailor or seaman if the pay of his naval officer was to be increased when doing sea service. In fact, if claimant's contention is correct, the pay of all officers and men in the Army, Navy, and Marine Corps who did service and are doing service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto, was increased 10 per cent for officers and 20 per cent for the enlisted men, *excepting the common seamen* on the vessel and the *enlisted men* in the marine when *not doing shore service.* We can not think that Congress intended this discrimination. It is more reasonable to conclude that it was the intent of Congress to place army officers and enlisted men in the Army on increased pay when exposed to the hazards and discomforts of oriental warfare; and to place the naval officers on the increased pay only when they were doing duty on shore and exposed to like hardships; and that the service of all naval officers and of seamen, the common sailor included, the petty officers and the marines, when doing sea service was regarded as simply normal duty.

On June 7, 1900, some twelve days after the passage of the act of May 26, making provision for increased pay to officers of the Army, serving in particular places named in the statutes, Congress passed an act making appropriations for naval officers for the year ending June 30, 1901. (See 31 Stat. L., p. 684.) In said last-mentioned act Congress made no provision for the increased pay contended for by claimant, and had

it intended to confer upon naval officers at sea the same kind of increase as provided for in the act for appropriation for the Army, it surely would have expressed the will and intent of the legislators in the act making appropriations for the Navy. In the latter act Congress dealt with mileage to naval officers and the minds of the legislators were directly centered upon the Navy and the officers thereof. The silence of Congress in this act upon the subject of increase is certainly evidence that it did not intend to confer such increase.

Again, in making appropriation for naval officers for the fiscal year ending June 30, 1902, which act was passed March 3, 1901, just one day after the passage of the act making appropriation for the support of the Army, Congress said: "That officers of the Navy * * * who have been detailed, or may hereafter be detailed, for *shore duty* in Alaska, the Philippine Islands, Guam, or elsewhere beyond the continental limits of the United States, shall be considered as having been detailed for shore duty beyond seas, and shall receive pay accordingly, with such additional pay as may be provided by law for services in island possessions of the United States." Now, it will be observed that this statute confers upon naval officers additional compensation when they have been detailed for *shore duty* in the places mentioned, showing conclusively that Congress did not intend, by either the act of May 26, 1900, or of March 2, 1901, to confer upon naval officers additional 10 per cent to their services for *sea duty*. If Congress so specifically set

forth that naval officers should receive certain increase for shore duty in certain localities, we may justly conclude that had it intended naval officers performing sea service in those localities to receive the 10 per cent increase, it would have specifically legislated to that purpose.

EFFECT OF STATUTE OF MARCH 2, 1901, IF CLAIMANT'S CONTENTION IS CORRECT.

It will be observed by reading the statute of March 2, 1901 (31 Stat. L., p. 903), that provision is made for an increase of 10 per cent for officers and 20 per cent for enlisted men of the Army over and above the rates of pay proper for those army officers and enlisted men "serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto."

Under claimant's contention all naval officers doing sea service are entitled to the increase of 10 per cent, provided the service is "beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto."

Our Navy is nearly always "beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto," and the greater portion of our naval officers, in fact nearly all of them doing sea service, are beyond the limits named in the statutes.

All those naval officers of that portion of our Navy which recently took part in the maneuvers in the Caribbean Sea and other places for drill and practice,

would be entitled to the increase under claimant's contention.

The normal place of service of the naval officer is not cruising around the shores and within the three-mile limit of the continental limits of the United States, but it is doing sea service in visiting ports of different nations, taking part in naval maneuvers, and performing various kinds of duties in all parts of the world.

Keeping in mind that the normal place of service of naval officers is upon the ships and vessels in commission of the United States, and that the ship furnishes conveniences, comforts, and a home for the officer, it does not seem reasonable that Congress, when providing the increase of 10 per cent for officers of the Army doing extra and hazardous duties, intended that naval officers performing their normal duty, which is sea service, should be entitled to the same rate of increase under and by force of the provisions of the first paragraph of section 13 of the navy personnel act. Such a construction would give the increase on their pay proper to nearly all officers of our Navy, and if the construction contended for by claimant is correct, Congress might as well have passed the broad, sweeping statute declaring *that all officers of the Navy doing sea service shall receive 10 per cent increase on their pay proper.*

PURPOSE OF NAVY PERSONNEL ACT THAT EQUALIZATION OF PAY OF THE ARMY AND NAVY OFFICERS OF EQUAL OR CORRESPONDING RANK.

It has always been recognized that the object and purpose of the Navy personnel act was the equalization of pay of army and naval officers holding equal or corresponding rank. Yet if claimant is correct in his contention, then Congress has unequally increased by 10 per cent the pay of naval officers doing their normal sea service, but has not increased the pay of army officers doing normal duty, which duty is within the continental limits of the United States.

But extra pay is only granted to army officers doing service in the places designed in the statute, which places were not the normal places of service. And it is in view of the fact that such places of service were not in contemplation when Congress fixed the pay proper, or the pay of the rank of the army officer for normal service, that extra pay is given for extra services of army officers performing duty outside the normal places of service. But with the naval officer, Congress fixed the pay of his grade having in view the officer's normal and usual service, to wit, service upon ships being duty outside the continental and beyond the 3-mile limit of the continental limits of the United States and the Territories contiguous thereto.

Again, claimant's pay of his rank, exclusive of any longevity pay, when doing sea duty is $4,500 per year, and his rank corresponds with the rank of colonel in the Army, the pay of which rank of colonel,

exclusive of longevity pay, is $3,500 a year. A colonel of the Army serving at either of the points designated in the statute is entitled to 10 per cent increase upon his $3,500, which in one year would amount to $350. Claimant contends that he is entitled to 10 per cent increase upon his $4,500, which in one year would amount to $450.

Thus it will be seen that claimant contends, for extra services in the waters adjacent to where the Army officer is doing duty, $100 per year more extra pay than his brother Army officer of corresponding or equal rank.

We do not believe that Congress intended any such discrepancy. Such a construction as contended for by claimant would do violence to the object of the Navy personnel act, which is the equalization of pay of the Army and Navy officer of equal or corresponding rank.

BASIS OF COMPUTATION OF 10 PER CENT INCREASE.

"PAY PROPER."

We now come to the question as to the basis of computation of the 10 per cent increase. Claimant's counsel contend that the increase where allowed should be computed upon the full maximum pay to which the officer is entitled, including longevity pay. The Government's contention is that the per cent of increase where allowed should be computed upon the normal or maximum pay of the grade and not upon the current yearly pay, which includes the increase of pay for length of service. The question presented turns upon

the meaning of the words "pay proper," as used in the statutes of May 26, 1900, making appropriations for the support of the Regular and Volunteer Army for the fiscal year ending June 30, 1901, and as used in the statute passed March 2, 1901, which statutes we have already quoted.

In April, 1898, Congress passed an act entitled "An act for the better organization of the line of the Army of the United States," and section 6 of said act provides in part as follows:

> That in time of war the pay proper of enlisted men shall be increased twenty per centum over and above the rates of pay as fixed by law.

Section 1612 of the Revised Statutes is in part as follows:

> The officers of the Marine Corps shall be entitled to receive the same pay and allowances and the enlisted men shall be entitled to receive the same pay and bounty for reenlistment as are or may be provided by or in pursuance of law for the officers and enlisted men of like grades in the infantry of the Army.

It will be seen that the foregoing is very similar to that portion of section 13 of the naval personnel act which provides that officers of the Navy shall receive the same pay, etc., as officers of corresponding rank in the Army.

The question was presented to the Comptroller of the Treasury as to whether, under section 6 of the act of April 26, 1898, the increase of 20 per cent of pay proper of enlisted men over and above the rates of pay

as fixed by law should be computed upon the minimum pay of each grade or upon such minimum pay increased by additional pay for length of service. The question was exhaustively considered by him, as follows:

> The second question is one of much greater difficulty. Section 1280, Revised Statutes, specifies the rate of pay of each grade of enlisted men of the Army. Sections 1281 and 1282, Revised Statutes, prescribe additional pay for enlisted men for length of service over and in addition to the rates of pay prescribed in said section 1280. Section 1284, Revised Statutes, prescribes for reenlisting, after five years' service, another additional increase of pay over and in addition to the rates of pay prescribed in said sections 1280, 1281, and 1282. Section 1285, Revised Statutes, prescribes another additional increase of pay of enlisted men of $2 per month on account of a certificate of merit issued for distinguished services upon recommendation of the President. All of said additional increases of pay of enlisted men, to which they may, upon certain conditions, become entitled, when they become so entitled are paid to them regularly, the same as they are paid the pay prescribed for them under said section 1280. The question presented turns upon the meaning of the words "pay proper of enlisted men," as used in said section 6 of the act approved April 26, 1898. Was it intended by said section 6 to limit the 20 per cent increase to rates of pay prescribed in said section 1280, being the minimum or lowest pay of each grade,

or was it intended that the 20 per cent increase should also be computed upon the additions to a soldier's pay to which he may be entitled for length of service, reenlisting, or a certificate of merit? The term "pay proper" seems to have been employed in the earlier decisions and opinions as a means of distinguishing with greater accuracy between "pay" and "allowances." On August 15, 1852, Second Comptroller Phelps, in passing upon a claim for emoluments or allowances under a private act granting 35 years' half pay, used the following language:

"The term 'half pay' is one that is very commonly used in our statutes, and has long ago acquired in commerce, as well as at the Departments and in the courts, a distinct and well-understood legal significance. It has always been construed to mean half the *pay proper* of the officer, exclusive of his emoluments and allowances, which are entirely distinct from the pay, are greater in amount, authorized by different enactments, and payable out of other appropriations.

"A familiar instance of this construction will be found in the numerous military and naval half-pay pensions which have always been understood as authorizing half pay proper."

In computing the three months' extra pay given by the act of July 19, 1848 (9 Stat., 248), for service in the war with Mexico, it was the rule to include only what the soldier was entitled to receive by way of stated compensation, as distinguished from allowances or emoluments; and, in order to more clearly define the distinction, the words "pay proper" were used

in the decisions construing said act. The words "pay proper" were apparently first used in legislation in section 4 of the act of March 3, 1865 (13 Stat., 497), which granted an addition of three months' *pay proper* to certain officers of the Volunteer Army who should serve to the end of the war, to be paid on their discharge. The words were also used in section 1, act of March 2, 1867 (14 Stat., 422), granting an increase of 33⅓ per cent of the *pay proper* of certain officers of the army for two years after July 1, 1866. In computing the three months' pay proper under the act of March 3, 1865, where an officer was discharged after July 1, 1866, and was therefore entitled to the one-third increase provided for in said act of March 2, 1867, such increase was included, thus treating it as a part of "pay proper." (Dec. Second Comptroller, vol. 45., p. 129.) These cases are the only ones I have been able to find where the words "pay proper" have been construed as including or excluding increased pay. Officers of the Army, before the act of 1867, received no increase over their regular rate of pay, except by way of rations for longevity under the act of July 5, 1838 (5 Stat., 258), which was never treated as pay. Since the legislation and decisions above referred to the words "pay proper of enlisted men" have been employed in different appropriation acts with such uniformity as to give them a definite and technical meaning. In the act of June 30, 1886 (24 Stat., 93), making appropriations for the support of the Army, separate and distinct

appropriations were made for the "pay proper of enlisted men of all grades" and for "pay to enlisted men by reason of length of service in addition to their regular pay." Appropriations have been made in substantially the same language for each succeeding year from 1886 to the present time.

In the act of Congress entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1899," approved March 15, 1898, is the following provision:

"PAY OF ENLISTED MEN.

"For pay proper of enlisted men of all grades, four million two hundred and ninety thousand dollars.

"Additional pay for length of service, including hospital corps, six hundred seventy-one thousand one hundred and seventy-two dollars."

Statutes upon the same or similar subjects should be taken into consideration in construing the law, and the same meaning given to the same words used in both, unless a contrary meaning is clearly intended. By the above act, and in each act making the annual appropriations for the support of the Army from and including 1886 to the present time, Congress has so distinguished "pay proper of enlisted men" from "additional pay for length of service" as to amount to a legislative declaration that in the use of the words "pay proper of enlisted men" it does not mean "additional pay for length of service."

In reply to your inquiry I have the honor to advise you—

1. That said section 6 of the act approved April 26, 1898, is applicable to the Marine Corps.

2. That the increased 20 per centum of pay of enlisted men over and above the rates as fixed by law, as provided in section 6, should be computed upon the minimum grades of pay of enlisted men. This does not affect the "additional pay for length of service" of enlisted men as now provided by law. It increases the minimum pay of all enlisted men in time of war 20 per centum, and places all of them, so far as said increase is concerned, upon an equality, which was the intention of Congress as I construe said section 6.

(4 Comp. Dec., 669–672.)

THE TYLER CASE.

"CURRENT YEARLY PAY."

The claimant relies upon the case of *Tyler* v. *The United States* (105 U. S., p. 244). The statute under consideration in the Tyler case is as follows (section 1262):

> There shall be allowed and paid to each officer below the rank of brigadier-general, including chaplains, and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years' service.

Claimant's counsel insist that this statute involves substantially the same question as the law under consideration. An examination of the case cited will convince anyone that there is practically no similarity between the case at bar and the Tyler case. In the

Tyler case the court was construing the meaning of the words "current yearly pay" for the purpose of fixing the basis for 10 per cent longevity pay, and the court said:

> We also hold that the words "current yearly pay" in section 1262 require that, when the increased pay for any period of five years is to commence, the 10 per cent must be counted on the regular salary added to its increase by any previous periods of five years; so that the original salary of the rank, and any additions of 10 per cent previously earned for periods of five years, constitute the current yearly pay on which said 10 per cent is to be calculated.

It will be seen that the court applies the term "regular salary" to the salary as fixed by section 1261, which said regular pay plus the increased pay, in the opinion of the court, constituted the officer's "current yearly pay."

There the court was simply construing the term "current yearly pay," as found in section 1262. It may be pertinently added that immediately after this decision Congress provided—

> that from and after the first day of July, eighteen hundred and eighty-two, the ten per cent increase for length of service allowed to certain officers by section twelve hundred and sixty-two of the Revised Statutes, shall be computed on the *yearly pay of the grade* fixed by sections twelve hundred and sixty-one and twelve hundred and seventy-four Revised Statutes. (See 22 Stat. L., p. 118.)

But in the case at bar the court is not required to construe the phrase "current yearly pay." The words do not occur in the statute under consideration. The court is required to give its interpretation of the words "pay proper," as used in the act of May 26, 1900, and the act of March 2, 1901.

The word "current," as used in the phrase "current yearly pay," has a definite and fixed signification. "Current yearly pay," as used in the Tyler case, means the current or running pay of the officer, including all extras, percentages, and everything that is included in the sum total of the officer's pay. The term "pay proper," however, would seem to be the pay of the grade aside from all extras and allowances. When speaking of the "pay of the grade," we mean the pay of the grade as fixed by section 1261 of the Revised Statutes. What better or more distinctive term could Congress have used in the various acts granting extras and allowances than the term "pay proper?" The pay fixed by section 1261 properly speaking is the pay of the officers therein mentioned and therefore is the "pay proper," all additions to this pay being extra pay, by reason of longevity, or of some particular place or time of service and allowance. Taken, therefore, in the light of all legislation upon the subject of pay and giving the words their normal meaning, the phrase "pay proper" is the appropriate and natural language to designate the pay described in section 1261, as distinguishing it from the full compensation, with all extras, longevity pay and allowances, added thereto.

FULL PAY IN TRANSIT AND RECEIVING ORDERS.

The court below did not allow the claim for full sea pay for services between December 2, 1899, when relieved as commanding officer of the U. S. S. *Lancaster*, at Barbados, West Indies, and February 7, 1900, when he took command of the *Baltimore* at Hongkong, China, during the most of which time he was traveling from one post of duty to the other; neither did it allow him full pay for his services on the 5th and 6th days of April, 1901, when in transit on a merchant steamer between Cavite, Philippine Islands, and Hongkong. From the judgement of the court on these items the claimant appeals, and inasmuch as the two appeals will undoubtedly be heard by the court at the same time, we here present the Government's contention on the claim in which the judgment of the court below was adverse to claimant.

As will be seen by finding 2 (p. 6 of the record), the claimant was relieved as commanding officer of the *Lancaster* December 2, 1899, and ordered to report to the Navy Department. He did so report December 12, 1899. On December 13, 1899, he was ordered to proceed to Hongkong for duty on the Asiatic Station, and sailed by merchant steamer from San Francisco January 6, 1900, and reported in obedience to orders at Hongkong, February 7, 1900, and was so placed in command of the U. S. S. *Baltimore*. It will be seen by the second claim (p. 11 of the record) that between the above dates of December 2, 1899, and February 7, 1900, he was paid shore pay at the rate of $3,825 a

year, which was 15 per cent less than sea pay, and he claims sea pay at the rate of $4,500 a year during said time. As to why Congress, by the first provision in section 13 of the navy personnel act, fixed the pay of a navy officer at 15 per cent less while doing shore duty is probably not necessary to investigate. The proviso is a part of the subject-matter upon which Congress was legislating in section 13, and is in plain, unambiguous terms which need no interpretation. The presumption is that Congress had a definite purpose in the enactment of said section and that it adopted and formulated the proviso of 15 per cent less pay when on shore duty in accordance with its view of harmony with that purpose.

Claimant's counsel necessarily contend that while claimant was traveling from Barbados to New York and during the time consumed in reporting to the Department and awaiting further orders and his travel to Hongkong on merchant steamer, he was not performing shore services but was on sea duty and therefore that he should receive his full normal pay while performing such duty. As the claimant during this time was not attached to a sea going vessel and was not attached to a vessel doing sea service until his arrival at Hongkong, he certainly can not contend that he was at sea, within the meaning of section 1571 Revised Statutes, which is as follows:

> No service shall be regarded as sea service except such as shall be performed at sea under the orders of the Department and in vessels employed by authority of law.

The foregoing section has reference to officers and seamen who have duties to perform in connection with the ship to which they are attached. As seen by the second finding of fact, claimant was relieved as commanding officer of the *Lancaster* and was not again attached to a seagoing vessel, nor had any duties whatever to perform concerning the responsibilities or management of a seagoing vessel, until his assignment to the *Baltimore* upon his arrival at Hongkong. He traveled on a merchant steamer to a point where he received his orders. He, therefore, was simply performing travel necessary to be performed in going to the Asiatic station where he had been ordered to report, and was not doing sea duty within the meaning of that term; neither was he attached to a seagoing vessel. In order that he might receive full compensation for this time he was allowed by the accounting officers pay at the rate of shore service. This service the naval authorities denominated shore duty. Claimant had none of the duties, cares, or responsibilities of an officer doing sea service. He had no control or responsibility of the merchant steamer upon which he was a passenger. He did absolutely nothing that could be construed into sea service under said section 1571.

In the case of *Ryan* v. *The United States*, decided by the Court of Claims January 5, 1903, this question was before the court, and the court, speaking through his honor Judge Peelle, delivered the following strong

and forcible opinion, which best states our position on this question:

> The question is, What was his status in respect to pay while en route to the Asiatic Station on board the mail steamer?
>
> It is our duty to give effect to the statute, if that can be done, and to do that we must of necessity determine which rate of pay provided for by section 13 the claimant is entitled to.
>
> By the purview or enacting clause of section 13, the officers of the line of the Navy and of the Medical and Pay Corps are given but one rate of pay, i. e., the higher or normal pay, but when serving on shore the first proviso thereto carves special exceptions out of the enacting clause and gives them "the allowances, but 25 per centum less pay."
>
> The exceptional pay, therefore, is shore pay, while the higher is sea pay, both dependent upon the character of the service to which they may be assigned by the Navy Department, whose orders in that respect are controlling if not in conflict with the law.
>
> The act of 1899 does not repeal or in any way modify Revised Statutes, section 1556, defining what shall constitute sea service, and as that section has been the subject of judicial construction in numerous cases, both by the Supreme Court and this court, it only remains for us to ascertain the purport of those decisions.
>
> In the *Symonds case* (21 C. Cls. R., 148), affirmed by the Supreme Court (120 U. S., 46, 50), the latter court says: "We concur in the conclusion reached by the Court of Claims.

namely, that the sea pay given in section 1338 may be earned by service performed under the orders of the Navy Department in a vessel employed, with authority of law, in active service in bays, inlets, roadsteads, or other arms of the sea, under the general restrictions, regulations, and requirements that are incident or peculiar to service on the high seas.

The case of *Bishop v. The United States* (31 C. Cls. R., 253) was affirmed by the Supreme Court (170 U. S., 54) for the reasons set forth in the Symonds case.

In the *Barnette case* (30 C. Cls. R., 107), affirmed by the Supreme Court (165 U. S., 176), the latter court said: "In order to come within the phrase 'at sea,' as used in this statute, it is not necessary that the vessel upon which the service is performed should be upon the high seas. It is enough that she is water borne, even if at anchor in a bay, port, or harbor, and not in a condition presently to go to sea. It has correctly been adjudged by this court that a vessel is 'at sea,' within the meaning of the statute, although she is used as a training ship, anchored in a bay, and not in a condition to be taken out to sea beyond the mainland, or is used as a receiving ship at anchor in port at a navy-yard and connected with the shore by a rope and having a roof built over her deck, and not, technically, in a condition for sea service."

In that case the officer claiming sea pay lived on board the vessel, wore his uniform, and was subject to the regulations respecting sea service; and so in the case of *Wright* (36 C. Cls. R., 288), where the officer in command of the U. S. S.

Nipsic, at anchor in the bay at Puget Sound (with a force on the vessel in the employment of the Bureau of Yards and Docks), the regulations applicable to a vessel at sea were observed, and the officer's quarters remained continuously on board, and for that reason he was allowed to recover sea pay.

In the *Hannum case* (36 C. Cls. R., 99), where an officer was directed to proceed to League Island Navy-Yard, Pa., for duty in charge of the machinery of the U. S. S. *Columbia* and the *Minneapolis*, and thereafter to take charge of the U. S. S. *Yankee*, in addition to his former duty, yet as the claimant lived on board the U. S. S. *Columbia* during that time and conformed to all the regulations governing vessels in commission, in the same manner as other officers attached to seagoing vessels, he was for that reason allowed to recover the sea pay of his grade.

In the *McGowan case* (36 C. Cls. R., 63), though the vessel had its crew and there were attached thereto medical and pay officers, chaplain and engineer and warrant officers, the officer in command of the vessel, who was also commander of the training station, took his meals at quarters assigned to him on shore, and the marines under his command were also quartered in barracks on shore, but as the time spent in actual duty on shipboard was not segregated from that performed on shore, he was not allowed to recover sea pay, the court saying:

"When a duty partakes of the character of sea service and shore duty, the facts of each particular case must be considered, and if from

the whole case there is a preponderance in favor of either service, the service having the paramount character must constitute the basis on which to predicate the right of payment."

In the recent case of *Taussig* (38 C. Cls. R., ——) the officer was assigned to the command of a vessel in the Coast and Geodetic Survey, but it was not shown that the claimant lived aboard the vessel or took his meals there. On the contrary, it was shown that his duties as hydrographic inspector were of far more importance than his duties as commanding officer of the vessel, and for that reason he was held not entitled to recover sea pay.

But we need not refer to other cases in support of the principles announced in the Symonds and Strong cases. The clear meaning deducible from them all is that to entitle an officer to the higher rate or sea pay provided by section 13, act of 1899, it must appear that such officer performed service "at sea under the orders of a Department and in a vessel employed by authority of law." Such we conceive to be the meaning of those cases—not that such service must have been performed on the "high seas beyond the sight of land," but such services must have been "performed under the orders of the Navy Department in a vessel employed by authority of law, in active service in bays, inlets, roadsteads, or other arms of the sea, under the general restrictions, regulations, and requirements that are incident or peculiar to service on the high seas," as held by the Supreme Court in the Symonds case, supra.

The character of the claimant's service, however, on board the U. S. transport *Monongahela*, from which he was detached and ordered to report to the Asiatic Station, is not in question in this case. The question is: Was the claimant's travel in a merchant vessel sea service within the meaning of section 1571 as construed by the Supreme Court and this court in the cases to which we have referred?

To so hold would not only be in conflict with the order of the Secretary of the Navy detatching the claimant from the vessel on which alone sea service can be performed, but would clearly not be in harmony with the decisions to which we have referred and would, in our opinion, be also in conflict with the express language of section 1571.

The status of an officer on sea or shore duty must be determined by the order of assignment by the Navy Department, whose order, in so far as it does not change the character of the service defined in section 1571, is controlling. That is to say, it is for the Navy Department to determine when and where an officer shall be assigned to duty and when he shall be detached therefrom; and while the service performed under such order will determine the basis of his pay, the order otherwise is conclusive on the court.

And so we must hold that when the claimant was "detached from duty on board the U. S. T. S. *Monongahela*" he thereby ceased to perform sea service, and consequently ceased to be entitled to sea pay and became entitled to the

exceptional pay known as shore pay, provided for by the proviso to section 13, act of 1899, which shore pay continued until he was again ordered to duty on a vessel at sea "employed by authority of law."

It follows that when an officer is detached from duty on board a vessel in which he performed sea service that his sea pay ceases and his shore pay begins, though he may thereafter travel by sea on a merchant vessel from one post of duty at sea to another.

The rule may seem harsh, but it is the law embodied in that section. That is to say, travel in a merchant vessel at sea is not sea service within the meaning of section 1571, as construed by the Supreme Court as well as this court, and our duty is to give effect to the statute in harmony with those decisions.

SHORE DUTY BEYOND SEAS.

Claimant's counsel say:

> His right to full pay on merchant steamers is not affected, even if section 1571 remains in force. If that section declares that the claimant was not engaged in "sea service" while so traveling, it necessarily follows that he was "on shore" within the meaning of the law, even if actually at sea. As he was traveling on duty under orders, he was on shore duty. While at sea outside the boundaries of the United States and its waters he was "beyond seas."

And it is argued that inasmuch as the claimant was beyond seas he should receive the same pay and allowances as an officer of corresponding rank in the Army

detailed for shore duty beyond seas. In other words, that where claimant's services were considered by the accounting officers as shore duty, he is entitled for such services to full pay by reason of the second proviso of said section 13.

In reply we insist that the officer was performing duty under orders which referred to shore duty within the continental limits of the United States. The order is found on page 2 of the record, dated December 13, 1899, and directed the claimant to proceed to San Francisco, thence to Hongkong, taking passage in a steamer sailing on a certain day, and required that the officer should report to the commander in chief of the Asiatic Station for further instructions upon the arrival of claimant at Hongkong. This order was dated at Washington and addressed to Captain Thomas at Yonkers, N. Y. His status, then, upon the receipt of said order, was that of an officer doing shore duty within the continental limits of the United States. He had been detached from the U. S. S. *Lancaster*, and had no further connection therewith. He had not been attached to any other vessel.

This status of this officer doing shore duty within the continental limits of the United States under the order as found on page 2 of the record could not be changed until he was assigned to duty by the commander in chief of the Asiatic Station. The mere fact that the vessel on which Captain Thomas sailed from San Francisco crossed the boundary line of the 3-mile limit did not change this status from shore duty within

the continental limits of the United States. Furthermore, it must be borne in mind that the officer had no responsibilities whatever during the time he was performing the travel going to the point where he was to receive instructions. The proviso in section 13 reads: "Naval officers detailed for shore duty beyond seas," which necessarily implies that the officer is detailed to perform duties to which there are attached certain responsibilities and labors in connection with taking charge of property belonging to the United States Government and commanding men placed under his control, such as commandants at navy-yards, or possibly for inspection duty, as to the inspection or material for vessels and other work being constructed by the United States. But this officer had no such responsibilities, nor any such duties to perform. It can not, therefore, be said that he was detailed for "shore duty beyond seas" in the ordinary acceptation of the term.

LOUIS A. PRADT,
Assistant Attorney-General.

JOHN Q. THOMPSON,
Special Attorney.

O

FILE COPY.

Supreme Court U.S.
FILED
OCT 8 1904
JAMES H. McKENNEY,
Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, APPELLANT,
v.
CHARLES M. THOMAS. } No. 94.

CHARLES M. THOMAS, APPELLANT,
v.
THE UNITED STATES. } No. 95.

APPEALS FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

LOUIS A. PRADT,
Assistant Attorney-General.

JOHN G. THOMPSON,
Special Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, APPELLANT, *v.* CHARLES M. THOMAS. } No. 94.

CHARLES M. THOMAS, APPELLANT, *v.* THE UNITED STATES. } No. 95.

APPEALS FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

AS TO THE EQUALITY OF ARMY AND NAVY PAY ESTABLISHED BY THE NAVY PERSONNEL ACT.

Counsel for the appellee assume to found the claim which is the basis of this action, upon the proposition that the navy personnel act established equality of pay between the officers of the Army and Navy by providing that the pay of officers of corresponding rank in the Army and Navy should be the same "in the same official circumstances." We assent to this proposition, but insist that the contention of claimant in this appeal involves the destruction of the equality of pay

7922—04

thus created, by calling for different pay to the great body of officers of the Army and Navy of the same relative rank "in the same official circumstances," instead of the same pay now received by them. As a result of the provisions of the navy personnel act, the pay of officers in the Navy for the performance of their *ordinary, normal duties*—that is, sea service (see dissenting opinion of Chief Justice Nott in this case, 30 C. Cls. R., 123)—was made the same as the pay of officers of corresponding rank in the Army for *their* normal and customary service. Such normal and customary service of army officers is chiefly service "within the limits of the States comprising the Union and the territories of the United States contiguous thereto." Having thus established equality of pay for service of like character, Congress proceeded in the same act to provide a special compensation for the performance by naval officers of shore duty—a character of service for which there is nothing corresponding in the service of army officers,—the same being fixed at 15 per cent less than their regular normal pay. But, at the same time, there was in the mind of Congress the fact that executive officers of the Navy might be called upon to perform the occasional service of shore duty in connection with ships, and accordingly express provision was made for this contingency by the *further* provision that when naval officers are detailed for shore duty beyond sea they shall received the same pay as that provided by law for officers of the Army detailed for duty in similar places, thus also establishing

equality of pay for service on land beyond sea by officers of either branch of the service. There, then, was established absolute equality of pay for officers of the Army and Navy for all service of a similar character or, to borrow the language of Chief Justice Taney, "in the same official circumstances." (20 U. S. 8 L., 102.)

Thus the effect of the navy personnel act was to adapt for officers of the Navy the pay table of officers of the Army with reference to the performance by each of their customary, normal service, with the additional provision that for the performance of service on land beyond sea they shall also receive the same pay. This equality is, by the terms of the act, to be preserved, so that any subsequent legislation affecting the pay of officers of the Army for their normal or customary service—that is to say, within the ordinary limits of the United States, or for service beyond sea—would equally affect the pay of officers of the Navy for like normal service—that is to say, on service, and for shore duty beyond sea. Applying, then, the statute of May 28, 1908, and March 3, 1911, increasing the pay of officers in the Army for service of normal character, namely, beyond sea, the pay of officers of the Navy for shore duty in the same localities is by virtue of the further proviso of the navy personnel act, correspondingly increased. And by thus applying these statutes for increased pay of army officers the equality of pay previously established by the navy personnel act remains undisturbed.

But the claimant, on the other hand, contends for an application of these statutes for increased pay which would essentially destroy this equality; for his contention is that as a result of said statutes the pay of officers of the Navy for the performance of their regular, normal duty—sea service—instead of continuing to be the same as that of officers of the Army for their usual and customary service, service within the United States, not beyond seas, as established by the navy personnel act, is increased 10 per cent over that of such army officers. In other words, the contention of claimant is, in effect, that a statute which increases the pay of army officers only when performing duty beyond seas substantially operates to increase all the pay of officers of the Navy.[a] It remains for counsel for claimant to supplement their argument in support of this extraordinary proposition by explaining how the equality of pay established by the navy personnel act can be said to be preserved by destroying it; and how the *same* pay provided by the navy personnel act for similar normal service, in the Army and Navy can be said to be continued by establishing *different* pay for such service.

In our former brief we pointed out that the inequality thus contended for by claimant is emphasized by the fact that, if his contention be assented to, there would result an increase of the pay of commissioned officers of the line of the Navy and of the Medical and Pay Corps for sea service beyond seas, without any corresponding increase in the pay of the petty offi-

[a] Except for ordinary shore duty.

cers and common sailors of the Navy for exactly similar service. And this, too, although express provision has been made by Congress for a very substantial increase of the pay of enlisted men of the Army for service beyond seas. It seems inconceivable that Congress should have intended to make any such unequal discrimination. Counsel's answer to this phase of our argument is merely that Congress has not assimilated the pay of the body of the Navy and of the enlisted men of the Army. This is true, but inconclusive. The fact remains that every reason which would tend to influence Congress to increase the pay of the higher officers of the Navy for sea service outside the ordinary limits of the United States would operate toward the enactment of a similar provision for the petty officers and ordinary seamen of the Navy for the same service. And since Congress has made no such provision in favor of the great bulk of our Navy, it is certainly a fair inference that the statutes under consideration are not intended to operate as favored legislation for the benefit of a select few, but that the full and equal purpose of these and kindred statutes is accomplished by increasing the pay of officers of the Army, the Navy, and the Marine Corps and of enlisted men of the Army and Marine Corps, for service on land beyond seas; an increase in which the great body of the Navy could obviously not expect to share, since such service is never required of them.

In brief, then, the contention of the Government is that these statutes under consideration provide increased pay for officers of the Army for special service in the island and outlying territory of the United States, and that such increase of pay inures to the benefit of officers of the Navy, by virtue of the *further proviso* of the navy personnel act, for shore duty in the same locality—that is, for similar service or "service under the same official circumstances;" that this increase of pay does not extend to sea service of naval officers, because it is not similar service nor service under like official circumstances; that, in other words, the manifest reason for an increase of pay of officers of the Army and Navy for service on shore beyond seas does not apply at all to the sea service of naval officers, and that therefore the claim of the claimant is based upon services which are not within the reason and purpose of the statutes invoked by him.

But it is urged by counsel for the claimant that the language of the statutes is so clear and unmistakable as to preclude all examination into their reason and purpose; that they provide in clear and unmistakable terms that the pay of officers of the Army and Navy shall be the same for all service performed in the places named, and that there is nothing more to be said upon the subject. This argument combines bad logic with an unwarranted assumption. These statutes for increase of pay relate in terms to the Army only, and they can be applied to officers of the Navy by

mplication only, pursuant to the provisions of the navy personnel act. It is certainly strange logic that rgues that naval officers are entitled by *implication* to he benefits of statutes having no direct reference to hem, without bringing their claim within the reason nd purpose of such statutes. Manifestly such claim hould be shown to be within the reasonable purpose f the statutes or it should be denied.

As for the assertion that the application of these tatutes is determined by place of service solely, it is n assumption founded on a clear perversion of the anguage of the statutes.

Suppose, by way of illustration, that Congress, after he passage of the navy personnel act, had enacted hat the pay of officers of the Army should be in-reased for such part of their service as should be per-formed by them while on board Government vessels, ould it be reasonably urged that such a statute would operate to give the same increase of pay for all ea service performed by officers of the Navy because uch service was performed on Government vessels?

The statute of May 26, 1900, gives the increase of ay to army officers in our island possessions and in he Territory of Alaska, service in China being in-luded in the operation of the act by the proviso of the ct of March 2, 1901; and by the general provisions f this later act officers of the Army are given increase f pay for service beyond the limits of the States omprising the Union and the Territories of the nited States contiguous thereto. But the service

thus provided for is military service, which is service performed on shore. How can sea service of naval officers be construed to be similar service to this or, even adopting the exact language of claimant's contention, "service in the same place?" Certainly service at sea is not performed in the same place as service on land. But circumstances may arise under which naval officers would be called upon to perform service in identically the same places beyond seas as Army officers, and for such service officers of the Navy do receive the benefits of this increase of pay by virtue of the *further proviso* of the navy personnel act, which makes provision in so many words for the same pay for services of officers of the Army and Navy performed in "similar places." Furthermore the record in this case shows that a very considerable portion of the service of the claimant on which this claim is based was performed upon the high seas in various trips between Hongkong and the Philippines, and between Hongkong and Japan and the Philippines and Japan; and surely in no sense can such service be deemed service in either China or the Philippine Islands.

But it seems to us that claimant's attempt to confine the operation of these statutes to an inquiry as to the literal location of the service performed is a perversion of the statutes in every sense. Clearly, it seems to us, these statutes were enacted to give to officers of the Army increased pay for unusual service because of the additional burdens, hazards, and discomforts attendant upon such service, and that there

could have been no legislative intention to give the same increase of pay to officers of the Navy except for services involving similar burdens, hazards, and discomforts, namely, shore duty performed in the localities named in the act of 1900 or, under the provisions of the act of 1901, beyond seas. And in recognition of the fact that these increased burdens and discomforts would naturally begin with the landsman upon the commencement of his voyage to his place of duty and continue on his return therefrom, the statute of 1901 provided that "the time of such service shall be counted from the date of departure from said States to the date of return thereto."

Now, if the contention of claimant is correct, since the passage of the act of March 2, 1901, every naval officer who performs any sea service outside the ordinary boundaries of the United States—that is to say, beyond the 3-mile limits of the United States,—will receive 10 per cent increase of pay for all such service, and that increase will begin on the day that his ship leaves port in the United States and continue until its return to some port of the United States. Can anything be more unreasonable and preposterous than this? But here counsel for claimant, still insisting that no inquiry into the character of the service provided for in these statutes is permissible, proceed to point out, on page 27 of their brief, that as a matter of fact the greater portion of the territory beyond seas in which such service would be performed possesses such a delightfully salubrious climate, and is altogether so attractive and

charming, that service in those localities, instead of being accompanied with extra hazards, discomforts, and burdens, is really a delight. The effect of all of which is that Congress has provided for an increase of pay for service in these outlying possessions of ours not only *apropos* of nothing in the way of extra burdens or hazards or discomforts, but actually because such service is altogether lovely. We nevertheless must insist that Congress passed these statutes for increase of pay with manifest reference to the unusual and onerous character of the service thus provided for. Of course the hazards of warfare, more especially referred to by the Court of Claims in their original opinion in this case, and to which particular reference was made in our former brief, can not properly be said to have been solely contemplated by the later act of 1901, but beyond question Congress had in contemplation at that time all the various conditions tending to make such unusual service more onerous and undesirable than service within the ordinary limits of the United States.

DECISIONS RELIED ON BY CLAIMANT.

We fail to find that the contention of claimant in this case receives support in any of the decisions cited in the brief for the appellee in this case. These decisions unquestionably sustain the proposition that the equality of pay provided for by the navy personnel act and similar prior statutes should be fully and fairly preserved, but in no instance has it heretofore been held

that assimilated pay should prevail for totally dissimilar services, as contended for in this case.

For example: In the case of *Richardson* v. *United States* (38 C. Cls. R., 193), especially cited by counsel, the court held that the navy personnel act, read in connection with section 1168 of the Revised Statutes, which provides "that assistant surgeons shall rank with a lieutenant of cavalry for the first three years of service, and with the rank of captain of cavalry after three years of service," operates to give the claimant mounted pay, for the obvious reason that the officer of the Army of corresponding rank with that of the claimant, being a cavalry officer, was presumed to be mounted.

As for the case of Crosley, also cited for claimant, that decision is based upon the principle for which we contend—that the navy personnel act assimilates Army and Navy pay for "*similar service.*" (38 C. Cls. R., 86.)

That part of the decision of this court in the *Gibson case* (194 U. S., 191–192), upon which counsel for claimant attempt to rely in this case, holds simply that the provision of the navy personnel act that officers of the Navy shall receive the same allowances, except forage, as are or may be provided for officers of corresponding rank in the Army means exactly what it says; and that therefore, under the operation of that provision, Navy officers could not continue to receive the sea ration since Army officers received no such allowance, because if officers of the Navy were to continue to receive the sea ration the result would not be

the *same*, but *different* allowances to the two branches of the service.

Reference is made by counsel to the fact that the accounting officers of the Government have allowed to officers of the Army this increase of pay in several cases where the service performed by them beyond seas was on army transports and on army gunboats in the Philippines. This service is described by counsel as "army sea service," and the inference drawn from these instances is that by the same token officers of the Navy should receive increased pay for their sea service. It is hard to treat this argument seriously. As we have already pointed out, the increase of pay is allowed because of the unusual character of the service for which it is provided. Certainly it can not be said that the unusual character or the burden of service beyond seas, by army officers, is at all lessened because performed on Government vessels, nor that it is any less military service because so performed; and certainly it would seem that there could be no plainer *non sequitur* than the argument that because a military officer is allowed the benefits of the act giving him increased pay for service beyond seas, where that service happens to take the unusual and extraordinary form of performance on a Government vessel, therefore a naval officer should in all instances receive the same increase of pay for the performance of his normal and customary duty on Government vessels.

THE INTENT OF CONGRESS AS SHOWN BY SUBSEQUENT APPROPRIATION ACTS.

In our former brief we referred to the subject of the intent of Congress in these statutes for increased pay as evidenced by subsequent appropriation acts. This portion of our argument we desire to amplify as follows:

The statute of May 26, 1900, which was the first statute granting 10 per cent increase to officers of the Army, did so in a proviso of the appropriation act for the Army for the fiscal year 1901, but did not provide for the payment of such increased pay. The subsequent appropriation statute of March 2, 1901, for the support of the Army for the fiscal year 1902, in which provision was made for increase of pay of officers of the Army serving beyond the continental limits of the United States, appropriated $500,000, "for additional 10 *per centum* increase on pay of officers serving at foreign stations." (31 Stat. L., p. 903.) This is followed by a similar provision in the army appropriation act of June 30, 1902, for the fiscal year 1903, the amount appropriated being $451,456. (32 Stat. L., p. 507.) In the army appropriation act of March 2, 1903, for the fiscal year 1904, $200,000 is appropriated for the same purpose. (32 Stat. L., p. 933.) The army appropriation act of April 23, 1904 (33 Stat. L., p. 259), for the fiscal year 1905, contains the following provision: "For additional 10 per centum increase on the pay of commissioned officers serving in the Philippine Islands,

island of Guam, Alaska, China, and Panama, $167,426.30."

But at no time since the passage of either of these statutes for increased pay has any appropriation been made for the payment of any such increased pay to the officers of the Navy.

It would seem that Congress could have manifested in no more significant and effective manner that these statutes were not intended to give the increased pay to officers of the Navy contended for in this case.

In this connection, see *Dunlap* v. *United States* (173 U. S., p. 75).

LOUIS A. PRADT,
Assistant Attorney-General.

JOHN Q. THOMPSON,
Special Attorney.

O

FILE COPY

FILED

SEP 8 19

In The

Supreme Court of the United States

OCTOBER TERM, 19

No. 84-19

THE UNITED STATES, Appellant,

v.

CHARLES R. THOMAS,

CHARLES R. THOMAS, Appellant,

v.

THE UNITED STATES,

Appeals from the United States Court of Claims

Brief for

IN THE

Supreme Court of the United States.

October Term, 1904.

THE UNITED STATES, *Appellant*,
v.
CHARLES M. THOMAS. } No. 94.

CHARLES M. THOMAS, *Appellant*,
v.
THE UNITED STATES. } No. 95.

Appeals from the Court of Claims.

BRIEF FOR CHARLES M. THOMAS,

APPELLEE IN No. 94, APPELLANT IN No. 95.

TABLE OF CONTENTS.

Page

I. Statement of the Case 4
History of the Case 4
Items Allowed by Court of Claims 4
1. Ten Per Cent Increase of Pay 4
2. Calculation of Increase 6
Item Rejected by Court of Claims 6
Full Pay While Traveling Between Vessels 6
Items Not in Dispute 7
II. Assignment of Error 7
III. Brief of Argument 8
Part I:
Ten Per Cent Increase of Pay Proper 8
Navy Personnel Act of 1899 (30 Stat. L. 1007) 8
Army Appropriation Act of 1900 (31 Stat. L. 211) . . . 9
Army Appropriation Act of 1901 (31 Stat. L. 903) . . . 9
Effect of these Acts 10
Analysis of the Act of 1899 11
Analysis of Acts of 1900 and 1901 14
The Navy Personnel Act Self-operating 15
The Expression Declares the Intent 16
Pay Statutes Literal 16
An Intelligible Reason 17
Service in Philippine and Chinese Waters 18
Details of Service 18
The Service Within the Statute 20
A Literal Identity 20
A Real Correspondence 22
Defenses 23
Ten Per Cent Increase Applies to the Navy 23
Hazards Immaterial 26
A Question of Place Alone 28
Proportion of Officers Entitled 28

III. Brief of Argument—Continued:
Increase Not Controlled by Shore Service 32
Army Sea Service 32
Naval Appropriation Act of 1901 33
Seamen's Pay Immaterial 38
Precedents 38
Analogy of Marine Corps 39
Opinion of Attorney-General Butler 40
Opinion of Attorney-General Johnson 40
Opinion of Attorney-General Cushing 42
Decision of this Court on Sea Ration 43
The Case Mathematically Stated 45
An Executive Amendment 45
Summary 46
Part II:
Mode of Calculating Increase 46
Statutes 47
Opinion of Court of Claims 48
Executive and Legislative Precedents 50
Dictionary Definitions 51
Part III:
Full Pay in Transit and Receiving Orders 52
The Question Involved 54
Traveling by Sea 54
The Rule as to Provisos 55
Statutory Definition of Sea Service, etc. 56
Definition No Longer in Force 57
If Shore Duty, it is Beyond Seas 58
Summary 59
Land Travel—Reporting at Navy Department 59
Other Decisions of the Court of Claims 60
Conclusion 61

I. STATEMENT OF THE CASE.

History of the Case.

The claimant, Charles M. Thomas, a captain in the Navy, filed his petition in the Court of Claims November 29, 1901, and an amended petition January 17, 1902 (Record, pp. 1–5), claiming various items of pay as due him under the provisions of § 13 of "An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States," Approved March 3, 1899, commonly known as the Navy Personnel Act (30 Stat. L. 1007), and legislation subsequent thereto.

On the first hearing of the case the court gave judgment, January 5, 1903, in favor of the claimant for an item of mileage, $97.42, not in dispute in this court, and disallowed all the remaining claims. The opinion of the court was delivered by Judge Peelle (Record, pp. 10–18). Mr. Chief Justice Nott delivered a dissenting opinion (pp. 19–21).

The claimant moved for a new trial (p. 22). On the hearing of this motion the court reversed its action in the disallowance of several of the claims and gave judgment, June 1, 1903, in favor of the claimant for an increased amount, $568.29. Judge Peelle delivered the opinion of the court (pp. 22–25). The case is reported 38 C. Cls. 113, 719.

The United States appealed from the judgment (foot of page 25) and the claimant took a cross appeal (foot of page 26).

Items Allowed by Court of Claims.

1. Ten Per Cent Increase of Pay.

The Navy Personnel Act of March 3, 1899, § 13 (30 Stat. L. 1007) quoted in full, *post*, page 8, provides that

"commissioned officers of the line of the Navy" "shall receive the same pay and allowances" "as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

The Army Appropriation Act of May 26, 1900 (31 Stat. L. 211), quoted in full, *post*, page 9, provides that "the pay proper of all officers" serving "in the Philippine Islands" and in other places named "shall be increased ten per centum" over the rates fixed by law.

The Army Appropriation Act of March 2, 1901 (31 Stat. L. 903), quoted, *post*, page 9, adds China retrospectively from May 26, 1900, to the places named in the act of that date and prospectively provides for the same ten per cent increase of pay to all officers "serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto."

The claimant, a commissioned officer of the line of the Navy, served as commanding officer of vessels cruising in Philippine and Chinese waters co-operating with the Army from May 26, 1900, to March 2, 1901, and in those and other waters "beyond the limits of the States comprising the Union" and contiguous territories from March 2, 1901, to June 12, 1901.

The claim is that by the operation of the Personnel Act of 1899, the claimant as an officer of the Navy is entitled to an increase of ten per cent on his pay for service after May 26, 1900, in the waters of the Philippine Islands or China, and after March 2, 1901, anywhere beyond the limits of the States comprising the Union.

The first decision of the Court of Claims was against this claim (paragraph 3 of opinion, Record, pp. 12, 13). This ruling was reversed on the second hearing and the claim allowed (Opinion, pp. 22–25).

The United States appeal from that part of the judgment allowing this item.

2. Calculation of Increase.

The question how this increase is to be calculated is also involved.

The pay of an officer of the Army and, since the passage of the Personnel Act, of an officer of the Navy likewise, is made up of two elements:

1. The grade or minimum pay under Revised Statutes, § 1261.

2. Increases of pay for length of service under Revised Statutes, § 1262.

The increase granted by the acts of May 26, 1900, and March 2, 1901, is of "pay proper."

The Government claims that pay proper is confined to the grade or minimum pay under § 1261, while the claimant insists that it also includes the increase for length of service under § 1262.

The Court of Claims decides on this point in favor of the claimant. (Opinion, near foot of p. 24.) The appeal of the Government challenges the correctness of this ruling.

Item Rejected by Court of Claims.

Full Pay While Traveling Between Vessels.

The claimant was detached from the *Lancaster* at Barbados, December 2, 1899, and reported on the *Baltimore* at Hongkong, February 7, 1900. Between these dates he was occupied in traveling on duty, partly on merchant steamers and partly on land, and in reporting at the Navy Department. He also traveled by merchant steamer from Cavite to Hongkong on April 5 and 6, 1901, in changing commands. For both these periods his pay has been reduced fifteen per centum in accordance with the first proviso to § 13 of the Personnel Act as "when on shore." He claims the full pay of an army officer.

The Court of Claims disallowed this claim. It forms the sole subject of the cross appeal of the claimant.

Items Not in Dispute.

Besides the above items now before this court for decision, two other items appear in the petition.

The first is for mileage. This was allowed by the Court of Claims, and no error is assigned on this allowance by the United States.

The second is for the navy ration while at sea. It was disallowed by the Court of Claims. This disallowance is in effect sustained by the decision in *Gibson* v. *United States* (194 U. S. 182, 191, 192), and no error is assigned thereon by the claimant.

II. ASSIGNMENT OF ERROR.

The claimant, Charles M. Thomas, appellant in No. 95, hereby assigns the following error in the judgment of the Court of Claims:

That said court held that the claimant, Charles M. Thomas, as captain in the Navy, was by virtue of the first proviso to § 13 of the act of March 3, 1899, known as the Navy Personnel Act, subject to a reduction of fifteen per centum on his pay as for service "on shore" between December 2, 1899, when relieved as commanding officer of the *Lancaster* at Barbados, West Indies, and ordered to report to the Navy Department, and February 7, 1900, when he took command of the *Baltimore*, at Hongkong, and also on the 5th and 6th days of April, 1901, when in transit on a merchant steamer between Cavite, Philippine Islands, and Hongkong;

Whereas said court should have held that he was entitled by virtue either of the opening clause of said § 13 or under the second proviso thereof to the full pay of a colonel of more than twenty years' service in the Army, $4,500 a year, without any reduction whatever.

III. BRIEF OF ARGUMENT.

PART I.

Ten Per Cent Increase of Pay Proper.

The principal question is the right of the claimant to an increase of ten per cent on his pay proper while serving after May 26, 1900, in the waters of the Philippine Islands and China, and after March 2, 1901, while performing sea service in those and other waters beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto.

His right to this pay depends upon the Army Appropriation Acts of 1900 and 1901 as made applicable to the Navy by the opening or enacting clause of § 13 of the Personnel Act of 1899. These acts in so far as they have any application to this case are as follows:

Navy Personnel Act of March 3, 1899
(30 Stat. L. 1007).

An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States.

Be it enacted, etc. *** * * Sec. 13. That, after June 30th, 1899, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army:**

Provided, **That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty; but this provision shall not apply to warrant officers commissioned under section twelve of this Act:**

Provided further, That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places: * * * [March 3, 1899.]

Army Appropriation Act of May 26, 1900
(*31 Stat. L. 211*).

Be it enacted, etc. * * * That hereafter the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the Territory of Alaska, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law in time of peace: * * * [May 26, 1900.]

Army Appropriation Act of March 2, 1901
(*31 Stat. L. 903*).

Be it enacted, etc. * * * That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the States comprising the Union, and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto:

Provided further, That the officers and enlisted men who have served in China at any time since the 26th day of May, 1900, shall be

allowed and paid for such service the same increase of pay proper as is herein provided for: * * * [March 2, 1901.]

Effect of These Acts.

Between May 26, 1900, and March 2, 1901, the claimant was commanding officer of a vessel of the United States Navy on the Asiatic Station in Philippine and Chinese waters, taking part in the military operations against the Philippine insurrectionists and for the relief of the legations at Pekin. After March 2, 1901, he continued to command vessels of the Navy, partly at various points on the Asiatic Station and partly en route to the United States. He arrived at San Francisco June 12, 1901, to which date his claim extends.

His services between May 26, 1900, and March 2, 1901, are described in detail in Findings VIII–XII (Record, pp. 8, 9).

From March 2, 1901, to the date of his arrival in the United States, June 12, 1901, they are shown in Finding II (Record, p. 6) and in the tabular statements constituting Findings V and VI (p. 7).

The act of March 3, 1899, gives to an officer of the Navy the same pay and allowances as are or may be provided by or in pursuance of law for an officer of corresponding rank in the Army.

The act of May 26, 1900, gives to an officer of the Army an increase of ten per cent on his pay while serving in certain places therein designated.

The act of March 2, 1901, gives to an officer of the Army ten per cent increase of pay while serving anywhere beyond the limits of the States of the Union and contiguous territories.

The right of the claimant as an officer of the Navy to the same increase of pay is therefore established by show-

ing that he served in the localities designated in the army statutes.

As to the period covered by the act of March 2, 1901, there can be no question as to this fact. From that date until June 12, 1901, the claimant was beyond controversy "serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto."

Were it not for the vigorous opposition to this claim on the part of the learned Assistant Attorney-General and the fact that the Court of Claims in its original decision (Paragraphs 3, 4, 5, pp. 12–14) misapprehended the basis of this claim, we should think discussion of this part of the claim a waste of time. This opposition makes necessary by way of answer to the various objections a complete discussion of the statutes relied on as well as a direct response to each adverse argument.

As to the period from May 26, 1900, to March 2, 1901, the objection is made that the claimant did not literally serve "in the Philippine Islands" and "in China," since the service was rendered in Philippine and Chinese waters. This objection is so plainly over-refined that it hardly needs a reply. Being secondary in importance it will be reserved for discussion until the various statutes are themselves more fully considered.

The contention of the claimant was adopted by the Court of Claims in its final opinion (Record, pp. 23, 24). A study of these acts will confirm the correctness of this conclusion.

Analysis of the Act of 1899.

The object of the opening clause of § 13 of the Personnel Act, *ante*, page 8, upon which this claim rests is to assimilate the compensation of officers of the Navy to that of officers of corresponding rank in the Army. This is

clearly stated in the opinion by Mr. Justice Day in *Gibson* v. *United States* (194 U. S. 182, 192):

"The later act distinctly provides that after June 30, 1899, commissioned officers of the line of the Navy and of the medical and pay corps shall receive the same compensation and allowance, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army. This section was intended to cover and in exact terms provides for all pay and allowance for naval officers except forage. Where it is the intention of the statute to make a distinction or exception in allowance, that exception is expressly stated. The subject matter of the later act provides for allowances to such officers, and it is to be the same as is now provided by law for Army officers of corresponding rank."

The conclusion in that case was that the navy ration allowed by prior statutes to officers of the Navy is taken away by the Personnel Act because that act places them on a strict equality with Army officers as to all pay and allowances.

The same conclusion is reached by the Court of Claims in this case (paragraph 6, pp. 15–18).

Other decisions rendered by the Court of Claims affirm and apply the same principle.

In *Richardson* v. *United States* (38 C. Cls. 182) it is held that officers of the medical corps of the Navy are entitled to the pay prescribed by law for an officer of the Army "mounted" rather than to that of an officer "not mounted" on the ground that all army surgeons of corresponding rank receive mounted pay whether in fact mounted or not.

The Comptroller of the Treasury in a decision dated January 11, 1904, says after quoting from that decision (10 Decs. Comptrollers of the Treasury, 523, 526):

"This decision was not appealed from, and has been accepted as the proper interpretation of the law."

He therein applies to the officers of the pay corps the decision of the Court of Claims in favor of mounted pay to the medical corps of the Navy. He holds that pay officers are entitled to mounted pay on the ground "that wherever Congress has provided for the appointment of paymasters for the Army they have given them mounted or cavalry pay" (pp. 527, 528).

In *Crosley* v. *United States* (38 C. Cls. 682) an aid to a rear-admiral in the Navy is held entitled to the same pay as an aid to a major-general in the Army.

In *Chauncey Thomas* v. *United States* (38 C. Cls. 70) mileage is awarded to an officer of the Navy under circumstances which would entitle an officer of the Army to it. Mileage is allowed in this case on the authority of that (Paragraph 1 of original opinion, Record, pp. 11, 12; final opinion, foot of p. 24 and top of p. 25).

In another case of the same officer, Chauncey Thomas, not yet reported in the regular series, the court applies to the Navy the provisions of an army act (April 26, 1898, § 7, 30 Stat. L. 365) granting to an officer exercising in time of war a command higher than that pertaining to his grade the pay and allowances of the grade appropriate to the command so exercised. This decision is in part quoted (10 Comptrollers' Decisions, 123) as follows:

"In the case of Chauncey Thomas, who was in temporary command of the U. S. monitor *Monadnock*, serving in the Philippine waters, the Court of Claims decided January 5, 1903, as follows:

"'The language of section 13 providing that the officers therein referred to "shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army," is broad enough, we think, to include the prior act, which grants to an officer in the Army exercising a command above that pertaining to his grade "the pay and allowances of the grade appropriate to the command so exercised."'"

The principle of equality of pay between the Army and the Navy established by the act of 1899 has thus been strictly upheld by every judicial decision rendered under the act. These decisions in effect follow those made by this court and other Federal courts under the act of 1834, now embodied in Section 1612 of the Revised Statutes, which assimilates the compensation of the Marine Corps to that of the Army. These decisions are hereinafter (pp. 39, 40) treated in detail.

Analysis of Acts of 1900 and 1901.

The act of 1900, *ante*, page 9, was a substitute for a part of Section 6 of the Army Organization Act of April 26, 1898, as follows:

"That in time of war the pay proper of enlisted men shall be increased twenty per centum over and above the rates of pay as fixed by law." (30 Stat. L. 365.)

The act of 1900 made two changes from that of 1898. It extended the increase of pay proper to the officers, although giving them only one-half the percentage of increase granted to enlisted men. It changed the ground of the allowance by making it dependent upon *place* of service instead of upon *time* of war. It defined the place specifically.

The act of 1901 continued the discrimination on the ground of place, but extended the field of increase to all localities "beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto."

By both acts Congress classified the officers of the Army according to place. The ground of classification appears upon the face of each statute. That of 1901 is based upon a division of the officers into (*a*) those serving at the home of the American people in the States of the Union and

their contiguous territories, and (*b*) those serving beyond those limits. One class, those serving within the limits of the States comprising the Union and the Territories of the United States contiguous thereto, are to continue to receive pay according to pre-existing law. The other class, those serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto, are to have their pay proper increased by ten per centum.

The grant is not of extra pay. Its language is "That hereafter the pay proper of all officers * * * shall be increased ten per centum"; and the subsequent proviso refers to it (top p. 10) as "the same increase of pay proper as is herein provided for." It is therefore an increase of pay proper and in no respect payment for extra services.

As affecting the pay of an army officer of rank and length of service corresponding to that of the claimant in this case it is as if the act read in connection with Revised Statutes, §§ 1261, 1262, 1263, 1267:

"Hereafter the annual pay proper of a colonel of over fifteen years' service when serving within the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be $4,500 and when serving beyond said limits $4,500+450=$4,950."

The Navy Personnel Act Self-operating.

The Army being thus classified, the Navy Personnel Act by its own force classifies the officers of the Navy in the same way. Where a classification for pay purposes is so clearly made by the statute that the words contain no ambiguity in themselves, the only requirement to entitle an officer to the benefit of the act is that he shall show that he is within the class entitled to the increased pay.

It is just as easy to determine whether an officer of the Navy is serving beyond the limits of the States compris-

ing the Union and the Territories of the United States contiguous thereto as it is to determine whether an officer of the Army is serving beyond those limits. This fact being determined in his favor, the right to the increase follows as a matter of course.

The Expression Declares the Intent.

The meaning of a statute must first be ascertained from its terms. If these are not ambiguous there can be no resort to the reasons which may be supposed to have influenced Congress in legislating. This principle is the commonplace of statutory construction. (*Dewey* v. *United States*, 178 U. S. 510, 520, 521.)

Here are three acts to be read together. The first, the act of 1899, says that changes in army pay are to affect also the Navy. The second, that of 1900, gives an increase of pay to army officers when serving in certain parts of the world. The third, that of 1901, gives an increase of pay to army officers when serving anywhere in the world outside of their home country.

The only question in the case of a naval officer is whether he is serving in the same parts of the world or beyond the limits referred to as the standard of increase for the army officer.

Pay Statutes Literal.

To no class of statutes is the rule of literal construction more peculiarly applicable than to those providing for the compensation of public officers. Such statutes are in their nature more or less arbitrary, sometimes giving a particular officer more and sometimes less than his services might be regarded as worth if they were estimated upon a *quantum valebant* basis. This truth will be even more apparent when an application of army pay statutes to other branches of the public service is attempted. Any

change in the pay of the Army at once affects not only that of the Navy under the Personnel Act, but also that of the Marine Corps (Revised Statutes, § 1612) and of the Revenue Cutter Service (Act of April 12, 1902, § 3, 32 Stat. L. 100). The application of an army pay statute to any of these branches of the public service can not be made to depend upon a requirement that some special reason be shown in every case for applying the act not only to the Army but to the Navy, the Marine Corps and the Revenue Cutter Service. Perhaps the reason will apply directly to one, but only indirectly or not at all to another of these branches of the public service. It is thus particularly necessary to enforce every army pay statute literally in applying it to these other organizations. Any other rule would only be productive of the utmost confusion and uncertainty where Congress has enacted an intelligible, because uniform, rule.

An Intelligible Reason.

While Congress is itself the judge of the reasonableness of its own plain acts, and no officer after bringing himself within the terms of those acts can be required to go further and show himself to be within some supposed intent, yet the reasons for the application of this statute to the Navy are as clear as in the case of the Army. Naval officers serving abroad are usually compelled to leave their families at home with all the attendant expenses of the home establishment, while at the same time mess and other personal expense bills must be met by themselves abroad, these expenses being frequently increased by reason of their great distance from home. The Government no longer makes the contribution to the payment of mess bills formerly given in the sea ration (*Gibson* v. *United States*, 194 U. S. 182, 191, 192). If they are cut off from the sea ration because, though peculiarly

appropriate to the Navy, it is an allowance not granted to the Army, the ten per cent increase granted to the Army can not be withheld from them on the ground that the conditions of the naval service make it inappropriate to the Navy. Under such conditions, they would receive neither the benefit granted by the old navy law nor that given by the new army law to officers separated from their families and living at a distance from home.

Service in Philippine and Chinese Waters.

There remains a question whether the service rendered by the claimant in the waters of the Philippine Islands and China between May 26, 1900, and March 2, 1901, is service "in the Philippine Islands" within the meaning of the act of May 26, 1900, or "in China" within the meaning of the proviso to that of 1901.

Details of Service.

The service of the claimant between those dates is very fully detailed in Findings VIII–XII (Record, pp. 8, 9), as follows:

"VIII. On May 26, 1900, while the claimant was in command of the U. S. S. *Brooklyn*, she left Hongkong and went directly to Cavite. While at Cavite she remained in the bay of Manila, off the naval station, about a half mile from Sangley Point and two miles from Cavite.

"IX. On leaving Cavite, on June 26, 1900, the vessel went to Hongkong for diplomatic reasons connected with the disturbed condition of affairs in China. Beside her regular complement of men, she had on board 19 marine officers and a battalion of 300 marines. The vessel then proceeded to Taku, stopping at Nagasaki, Japan, to coal, and at Chefoo to inquire as to the condition of the *Oregon*. The anchorage of the *Brooklyn* was about 12 miles off the mouth of the Peiho River in the Gulf of Pechili, it being impossible to approach nearer with so large a vessel, on

account of shallow water. The *Newark* was there present on the arrival of the *Brooklyn*, and the *Yorktown* and the *New Orleans* arrived later, as well as the dispatch boat *Zafiro*, and the *Buffalo*. All of the naval powers of the world were represented there by about fifty war vessels, and the presence of the *Brooklyn* there was on account of the Boxer difficulties then existing in north China. The *Brooklyn* cooperated with the army on shore by assisting them to land, providing them with steam tenders and steam launches, and towing them from the anchorage to Tongku. There were frequent conferences on board the *Brooklyn* between the military authorities and the admiral and other officers. General Chaffee boarded the *Brooklyn* on his arrival to consult the commander in chief, and the army quartermaster in charge of transportation was in frequent conference in regard to the facilities for landing the United States troops. The marines on board the *Brooklyn* under Colonel Meade, were landed, and the commander in chief of the naval force went up to Tientsin in person, after the fight at Tientsin, to investigate the condition of the marines there. The officers of the army in passing visited the *Brooklyn* to pay their respects to the commander in chief as the senior military representative of the United States in China, and those of higher rank called to consult him as to the state of affairs on shore. The flagship *Brooklyn* had a representative on shore in connection with the military operations, Lieut. Julian L. Latimer, detailed as a naval aid to General Chaffee, who remained with him for a period of about six weeks. He accompanied him in the expedition for the relief of Pekin, and was present at the capture of Pekin and the retreat of the Chinese forces. His principal duty was to keep the commander in chief thoroughly advised of the state of affairs, and this information was communicated to the Government at Washington by cablegram, through the naval dispatch boat *Zafiro* carrying all messages to Chefoo. On the return of the *Brooklyn* to Cavite, leaving Taku on October 11, 1900, the vessel stopped at Nagasaki and replenished with coal, going thence to Shanghai, anchoring at Woosung, the man-of-war anchorage for Shanghai, and coaled ship there.

"X. On reaching Cavite, on November 3, 1900, the *Brooklyn* anchored off the city of Manila, where it served as the headquarters of the commander in chief in the Philippine waters. She was used to transport the governor-general of the Philippines for a tour of inspection to Olongapo, keeping on that trip from half a mile to 3 miles from land. She went to Iloilo to permit an inspection by a board ordered by the Navy Department to select a naval station in the Philippines, keeping distant from shore on that trip from an eighth of a mile to 2 miles. She took another trip to Olongapo in connection with the investigation of a naval station, going and returning by substantially the same route as on the former trip. Between these trips, and afterwards until leaving Manila, the vessel remained at headquarters on the station.

"XI. While at Hongkong in February, 1901, the vessel was at the Kowloon dockyard being docked and undergoing minor repairs.

"XII. After the return of the *Brooklyn* to Cavite she became headquarters on the station again in the bay of Manila, and so continued until after March 2, 1901."

The Service Within the Statute.

The *Brooklyn*, of which the claimant was commanding officer, was thus occupied during the entire period from May 26, 1900, to March 2, 1901, in the conjoint military operations of the Army and Navy in the Philippine Islands and China. These services entitle the claimant to the ten per cent increase,—

1. Because he literally served "in the Philippine Islands" and "in China."

2. Because naval service rendered at sea is of a character corresponding to army service on shore in the Philippine Islands and in China

A Literal Identity.

1. The terms used in their natural and ordinary meaning cover service in the waters of the Philippine Islands

and China. Waters within a limit of three miles are by international law within the territory and jurisdiction of the nation possessing the shore. Perhaps this test does not apply in all its strictness in these cases. This statute can not be fairly construed to deprive an officer cruising among the Philippine Islands of the benefits of the increase the moment his ship happened to get beyond the three-mile limit. On the other hand, under the later act of 1901, an officer sailing with his ship from New York to Newport could hardly claim, within the intent of the statute, to be serving beyond the limits of the States comprising the Union, even though for a part of his voyage he would be beyond the three-mile limit.

A more reasonable test was applied by Attorney-General Cushing in 1855 (7 Opinions, 299) in treating the words "who served in the Pacific Ocean on the coast of California and Mexico," the material portion of his opinion being hereinafter quoted, pages 42, 43.

The War and Treasury Departments, too, in applying this statute of 1900 to service of army officers treated it as covering service in Philippine waters equally with land service. The Army had a fleet of gun boats in Philippine waters under the command of army officers during this same period, and these officers received the ten per cent increase on their pay provided by the act of 1900. "Since May 26, 1900, army officers serving on army gunboats in the Philippines have been paid the ten per cent increase provided for by the acts of March 2, 1901, and May 26, 1900." (Last Paragraph Finding XV, foot of page 9.)

Such payments are founded upon a correct construction of the law, service "in the Philippine Islands" clearly including service afloat in the waters of those islands as well as service ashore.

If, before officers of the Navy can receive the increase

for their service at sea in the waters of the Philippine Islands, it is necessary to show that officers of the Army have also received it for service at sea, that requirement is amply met.

A Real Correspondence.

2. But it is not necessary to show identical service on the part of an officer of the Navy to that of an army officer to entitle him to army pay. It is sufficient to show correlative service. The normal duty of the army officer is on land. The normal duty of the naval officer is at sea. Hence the correlative duty to entitle an officer of the Navy to full pay of the corresponding rank in the Army is sea, not shore duty. Naval officers are entitled to have these words of place read with relation to the varying conditions of the two services. Cruising among the Philippine Islands is the naval equivalent of campaigning on the Philippine Islands. Protecting American interests in Chinese waters and threatening Chinese forts is the naval equivalent of the Army marching to the succor of besieged Americans in Pekin. Each is service in the Philippine Islands and in China, and this is the only condition of the increase. When therefore the army law gives to an army officer an increase of pay for service in the Philippine Islands and in China, the principle of equal pay for corresponding service gives a naval officer the same increase of pay for the appropriate service of the naval branch in a corresponding place, namely in Philippine and Chinese waters.

The claimant, therefore, while commanding a vessel of the Navy, in Philippine and Chinese waters from May 26, 1900, to March 2, 1901, was "serving in the Philippine Islands" and "in China" within both the letter and the spirit of the acts of 1900 and 1901.

Defenses.

This completes the presentation of the claimant's case, and would be all that we would submit were it not for certain defenses urged by the Attorney-General and in part noticed in the original opinion of the Court of Claims.

These defenses are as follows:

1. That the acts of 1900 and 1901, granting the ten per cent increase to officers of the Army are not applicable to the Navy.

2. That the increase is granted to compensate army officers for greater hazards which are not suffered by naval officers.

3. That the proportion of officers of the Navy affected is so great as to embrace practically all officers doing sea service.

4. That the increase is granted for shore service only.

5. That enlisted men in the Navy receive no increase of pay for service beyond the continental limits of the United States; therefore officers should not receive it.

These defenses will be taken up in their order.

Ten Per Cent Increase Applies to the Navy.

It is first urged on behalf of the United States that the act of 1900, granting increased pay to officers of the Army serving in designated localities, and that of 1901, granting such increase to all serving beyond the limits of the States and Territories of the Union, do not constitute legislation of the character contemplated by that part of Section 13 of the Personnel Act which provides that officers of the Navy "shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army."

This objection strikes at the whole life of the Personnel Act, and is fatal to anything like equality between the officers of the Army and of the Navy. The pay of an officer of

the Army of any given rank is not a fixed and unchangeable amount, but varies greatly with circumstances.

Officers of the Army receive grade pay (Revised Statutes, § 1261) and increased pay for each five years of service in the Army (Revised Statutes, § 1262). If a classification of officers of the Army by place of service does not equally apply to those of the Navy, neither should a classification by length of service apply.

Their pay in several grades differs for officers "mounted" and "not mounted" (Revised Statutes, § 1261). "Mounted" pay often depends upon other conditions than being actually mounted; hence "mounted" pay is received by many officers in the Navy, though the duties of a naval officer seldom if ever require an actual mount. (*Crosley* v. *United States*, 38 C. Cls. 82; *Richardson* v. *United States*, 38 C. Cls. 182; 10 Comptrollers' Decisions, 523.)

Officers on waiting orders, absent from sickness or wounds, absent with leave for other causes, and absent without leave, receive varying rates of pay in the Army (Revised Statutes, § 1265), differing materially from the rates fixed by former legislation for the Navy (Revised Statutes, §§ 1556, 1557).

Officers retired from active service receive but one rate of pay in the Army (Revised Statutes, § 1274) which now of course applies to the Navy; though under the former law officers of the Navy had two different rates of pay on the retired list (Revised Statutes, §§ 1588, 1593).

Officers of the Army dropped from the service for incapacity, or as it is styled in the statute (Revised Statutes, § 1252) "wholly retired from the service," receive upon their retirement one year's pay and allowances (Revised Statutes, § 1275). Officers of the Navy under the old law (Revised Statutes, § 1505) when so dropped or wholly retired (Revised Statutes, § 1454) received no pay on being retired.

Officers of the Army exercising a higher command in time of war receive increased pay while so exercising it. This was not allowed by previous legislation to the Navy; but the Navy now receive the benefit of this army law. (*Chauncey Thomas* v. *United States*, quoted, *ante*, page 13.)

An aid to a major-general in the Army receives (Revised Statutes, § 1261) "$200 a year, in addition to pay of his rank." The Court of Claims has decided in favor of this special increase of pay in the case of an aid to a rear-admiral. (*Crosley* v. *United States*, 38 C. Cls. 82.)

The allowances of the Army which are in express terms granted to the Navy with the exception of forage are all for occasional service.

The principle of the Personnel Act is well summarized by the learned Chief Justice of the Court of Claims in his dissenting opinion in this case, a principle now adopted by the court in its later opinion, as follows (Record, p. 18):

"It was inevitable that in the application of army law to naval services doubts should arise, but in the application of the statute, the statute has given us one plain rule for guidance, and that is that the pay of army officers and navy officers in like official circumstances shall be precisely alike, save one exception hereafter to be named."

And again (p. 19):

"The controlling purpose of the Navy Personnel Act being to make navy pay and army pay identical, it becomes the controlling principle by which the statute should be interpreted. The end always to be attained is that the pay of an officer of the Navy shall be the same as the pay of an officer of the Army of relative rank in the same official circumstances."

And finally (p. 20):

"As the army pay became the pay of the Navy when navy pay was abolished, so the different kinds of army pay become the pay of naval officers when the conditions of

their official duty require a departure from regular or active service pay. Ordinary pay, longevity pay, staff pay, leave-of-absence pay, and waiting-orders pay of the Army become the ordinary pay, the longevity pay, the staff pay, the leave-of-absence pay, and the waiting-orders pay of naval officers."

But the most striking analogies under this branch are afforded by the interpretation placed by this court upon the act of 1834, now Section 1612 of the Revised Statutes, in the case of *United States* v. *Freeman* (3 How. 556), which, with other cases under the same act is hereinafter more fully referred to, *post*, pages 39, 40. Here nearly every item depended upon some provision fixing some special rate of pay under peculiar circumstances for the Army; and that rate of pay was in each instance allowed to or withheld from the Marine Corps according as the army officer would or would not be entitled to it.

To place any other construction upon the legislation now before the court would be fatal to all equality between the Army and the Navy, and would reintroduce that very inequality between them which it was the object of the Personnel Act to remove.

Hazards Immaterial.

It was suggested in the first opinion of the Court of Claims (p. 14) that the increase to officers of the Army was in recognition of extra hazards attending their service in the Philippine Islands and China arising out of the climatic conditions, oriental and uncivilized modes of warfare, and contagious diseases.

The simple answer to this position is that no such condition is expressed in the act, while we may go even further and show that the possibility even of an implication that that was its object disappears on an examination of the act as a whole.

The act of 1900 names five countries, Porto Rico, Cuba, the Philippine Islands, Hawaii, and Alaska, a sixth, China, being retroactively included from May 26, 1900, by the act of March 2, 1901. Conditions of hazard or hardship do not exist in any of these countries except the Philippine Islands and China. Porto Rico enjoys a delightful winter climate, and even in summer the heat is tempered by sea breezes. In Cuba hostilities were over nearly two years before the passage of the act of 1900, and the country had by the time of the passage of that act become entirely salubrious under the vigorous sanitary measures taken during our occupation. As to the Hawaiian Islands, "Though lying in the tropical zone, the salubrity of their climate and the fertility of their soil had attracted thither large numbers of people from Europe and America," etc. (*Hawaii* v. *Mankichi*, 190 U. S. 197, 211.) Alaska is likewise a peaceable and very healthy country, inhabited by no uncivilized races except a few peaceable Indians. Its southern parts, where most of the Army and Navy are sent, have a very mild climate even in winter.

There is no distinction of time, place, or condition in the Philippines for the grant of the increase. The army officers who endured the greatest hazards and hardships in the capture of Aguinaldo received the same increase as the officer having the lightest office duty in the city of Manila. There was no greater rate of increase in 1900, when the Army was in active pursuit of a treacherous enemy in difficult territory than there is at present when the civil Government is in supreme control.

On July 4, 1902, the President by his Philippine Amnesty Proclamation declared, "The insurrection against the authority and sovereignty of the United States is now at an end, and peace has been established in all parts of the archipelago, except in the country inhabited by the

Moro tribes, to which this proclamation does not apply." (32 Stat. L. 2014.)

Yet notwithstanding the restoration of peace in all but an insignificant portion of our possessions, the ten per cent increase goes on, and was indeed re-enacted contemporaneously with the proclamation (32 Stat. L. 512). This of itself is a sufficient answer to the contention that it is granted by reason of conditions of warfare. Locality, not hazard, is the test prescribed by the statute for the right to the increase.

Moreover, how can it be said that officers of the Army serving in the Philippines or in any other part of our new possessions are incurring "extra hazards"? To guard our outlying possessions has always been the duty of the Army and can in no respect be regarded as extra service.

A Question of Place Alone.

The discrimination actually made by Congress is in the place of service alone. This is exactly expressed. The statute neither expresses nor implies any discrimination on account of "extra hazards," "climatic conditions," "oriental and uncivilized modes of warfare," or "contagious diseases." To interpret the statute with any such distinction would be to substitute for the expressed legislative will a judicial view of what constitutes a proper rule of legislation.

Since the place of service alone gives title to the increased pay to army officers, the increased pay must be awarded in the statutes without regard to considerations not found in the legislation of Congress.

Proportion of Officers Entitled.

The question of the proportion of officers entitled seems to us entirely immaterial. Yet the position is taken by

counsel for the United States that a concession of this increase to the Navy would in effect give the ten per cent to nearly all officers on sea duty. Immaterial as this statement is, we can not allow it to pass without showing its groundlessness.

At the date of the passage of the act of May 26, 1900, the Army consisted of 3,952 officers and 96,474 enlisted men, of whom 2,770 officers and 70,442 enlisted men were serving in the several countries named in the act of 1900 as those for service in which increase of pay proper was granted. (Annual Report War Department, 1900, vol. 1, part 2, tables facing p. 30.) At the time of the passage of the act of March 2, 1901, the Army consisted of 4,103 officers and 96,924 enlisted men, of whom 2,474 officers and 62,176 enlisted men were "serving beyond the limits of the States comprising the Union and the territories of the United States contiguous thereto. (Annual Report War Department, 1901, vol. 1, part 2, tables facing p. 30.) In other words, in 1900 about three-fourths of the Army became entitled to this increase of pay proper, and in 1901 about two-thirds. An increase of pay which includes in one instance all but a third and in the other all but a fourth of the Army, certainly can not be said to be based upon the ground of extra hazard or hardship. The increase of pay which was received was the rule in the Army. The failure to receive it was the exception.

In the Navy the proportion of officers affected by both acts is less than in the Army. The Navy List for July, 1900, shows officers on the active list entitled to army pay as follows:

Line	921
Medical Corps	183
Pay Corps	135
Total	1,239

The officers of the same branches of service then in the localities named in the act of May 26, 1900, are shown in the same document as follows:

Philippine Islands and China, counting all on vessels on the Asiatic Station, except the *Culgoa*, then in Australia, and including the U. S. S. *Buffalo*, *Calamianes*, *Solace*, and *Yosemite* (Report of the Bureau of Navigation for 1901)		263	
Philippine Islands and China, on shore .	16		
Cuba and Porto Rico, on vessels in those waters (Rep. Bu. Nav. 1901—*Uncas*, p. 75; *Vixen*, p. 77)		8	
Cuba and Porto Rico on shore	5		
Hawaii, on vessel (*Iroquois*)		2	
Hawaii, on shore	2		
Total	23	273	296

To concede to the Navy in the waters of the places named the benefit of this army act gives the extra pay an extension far less in proportion than it possesses in the Army.

In July, 1901, there were 1,234 officers on the active list entitled to army pay, as shown by the Naval List of that date. The number on sea duty "beyond the limits of the States" and contiguous territories may be stated as follows from the same source:

ASIATIC STATION:	
At sea, as shown in the Navy List for July, 1901, and including the *Bennington*, *Castine*, *Concord*, *Marietta*, *Newark*, and *Petrel*, returning from Asiatic Station (Navy List, July, 1901, p. 71), and the *Solace* on special service (Navy List, July, 1901, p. 68; Rep. Bu. Nav. 1902, p. 80) .	330
SOUTH ATLANTIC STATION:	28
Carried forward	358

Brought forward		358
NORTH ATLANTIC STATION:		
Mayflower, on special duty in West Indies (Navy List, July, 1901, p. 68; Rep. Bu. Nav. 1902, p. 67)	8	
Yankton, on special duty in Porto Rico (Navy List, July, 1901, p. 68; Rep. Bu. Nav. 1902, p. 90)	5	
PACIFIC STATION:	—	13
Abarenda,—Samoa	6	
Philadelphia, in Hawaii (Rep. Bu. Nav. 1902, p. 73)	15	
	—	21
Training Ships outside United States waters in July, 1901:		
Alliance (Rep. Bu. Nav. 1902, p. 33)	9	
Hartford (Rep. Bu. Nav. 1902, p. 55)	13	
Monongahela (Rep. Bu. Nav. 1902, p. 69) . .	12	
	—	34
Station Ships at—		
Guam—*Brutus*	9	
Honolulu—*Iroquois*	1	
	—	10
		436
Shore duty in July, 1901, at—		
Guam (Navy Reg. Jan. 1901, p. 163)	4	
Havana	2	
Hawaii	3	
Philippine Islands	22	
San Juan	3	
Samoa	1	
Yokohama	2	
	—	37
Total outside the United States		473

This is 146 less than one-half the officers of the Navy or 38 per cent, as against two-thirds of the officers of the Army entitled to receive the ten per cent increase under

the rule of equality for which this claimant is now contending.

Of course even were the proportion much greater, the rule of law would not be altered. As a matter of fact, however, only a minority of the officers of the Navy would be entitled to this increase, while a majority of those in the Army were entitled to and received it during the time covered by this claim.

Increase Not Controlled by Shore Service.

It is argued that as the army service for which the increase is granted is shore service, the only naval service to which the increase can apply is shore service.

To this there are two complete answers:

1. That the army in numerous instances receives this increase for services at sea.

2. That the language of the statute is inconsistent with any such distinction.

Army Sea Service.

There are several cases in which army officers serving afloat receive this increase. We have already, *ante*, page 21, discussed the Army gunboat service on which many officers served. It appears as to both them and the Army transports:

"It has been the practice of the Pay Department to pay officers of the Army serving on board U. S. Army transports the ten per cent increase of pay provided for by act of March 2, 1901, from date of departure from the United States to date of their return thereto, inclusive.

"Since May 26, 1900, army officers serving on army gunboats in the Philippines have been paid the ten per cent increase provided for by the acts of March 2, 1901, and May 26, 1900." (Finding XV, Record, p. 9.)

The Army transport service here referred to was of

great magnitude at the time this claim originated and is still quite large. A report made by the Secretary of War, February 21, 1902, in response to a resolution of the Senate, shows that during the period (1900–1901) covered by the present claim the Government was the owner of twenty-four transports, purchased for $7,710,344, and repaired at an expense of near $10,000,000. (Senate Document 369, 57th Congress, 1st Session; as to purchase, page 5; as to repairs, page 19.)

In addition to these vessels owned by the Government forty-three others owned by private parties were in the service under charter, their total charter-party valuations amounting to $12,250,000. ("Partial list of the chartered vessels on the Pacific Coast engaged in the transport service to Manila, &c." Senate Document 186, 56th Congress, 2d Session.)

The act of 1901 also in express terms allows this increase from the date of departure from the United States to the date of return thereto; thus necessarily involving in every instance a large amount of time spent by the army officer at sea without the performance of any duty but traveling.

Officers of the Army thus receive it when on duty in the prescribed localities, whether at sea or on land. Shore service is not a condition of increase in the Army and can not be in the Navy.

Naval Appropriation Act 1901 (*31 Stat. L. 1108*).

The claim in this case to the benefit of the army acts of 1900 and 1901 is based upon the opening or enacting clause of section 13 of the Navy Personnel Act of 1899, *ante*, page 8.

The Court of Claims in its original opinion conceived it to be a claim based upon the second proviso to that act, as of an officer "detailed for shore duty beyond seas." In

the second opinion this error is thus adverted to (Record, pp. 23, 24):

"As the primary purpose of those acts was to grant to officers and enlisted men in the Army 10 per cent increase on condition of their service in China, Cuba, and the territorial possessions named, the court in its former opinion labored under the belief that to entitle naval officers to such increase it was incumbent upon them to show that they had, in the language of the second proviso to section 13, been 'detailed for shore duty beyond seas'; that is to say, to entitle naval officers to the 10 per cent increase it was held that they must perform shore service beyond seas at places similar to those where officers of the Army were detailed for duty."

The fact that this view was insisted upon by the United States and at first sustained by the court, renders it necessary to review an act deemed by us to have no legitimate place in the discussion. The act provides (31 Stat. L. 1108):

"That officers of the Navy, and officers and enlisted men of the Marine Corps, who have been detailed, or may hereafter be detailed, for shore duty in Alaska, the Philippine Islands, Guam, or elsewhere beyond the continental limits of the United States, shall be considered as having been detailed for "shore duty beyond seas," and shall receive pay accordingly, with such additional pay as may be provided by law for service in island possessions of the United States. * * * (March 3, 1901.)"

The history of this legislation explains its meaning. After the passage of the act of March 3, 1899, naval officers on shore duty in the Philippines claimed full army pay on the ground of being "detailed for shore duty beyond seas," as provided for in the second proviso of Section 13. The Comptroller of the Treasury decided that the words "beyond seas" mean "beyond the jurisdiction of the United States"; and the Philippine Islands being within

the jurisdiction of the United States are therefore not "beyond seas."

The Paymaster-General of the Navy complained of this decision as follows:

"This decision operates to reduce the pay of all officers serving in those islands who are paid under the army schedule to the pay they would receive if serving in the United States, or 85 per cent of their sea pay." (Report of the Secretary of the Navy for 1900, p. 942.)

The Secretary of the Navy concurred in this view as follows:

"It has been held by the accounting officers of the Treasury—contrary, it seems to this Department, to the spirit and to the familiar interpretation of the letter of the statute—that Porto Rico, the Hawaiian Islands, Guam, and the Philippines, because they are now a part of our own territory, are therefore not "beyond seas" within the meaning of the statute above quoted. Consequently, officers serving in those islands do not receive the same pay as officers of the Army doing similar duty, but receive the same pay as if serving on shore within the continental limits of the United States—that is, 85 per cent of their sea pay. Further, this decision is retroactive in its effect, and it will accordingly be necessary to check against officers who have rendered service within the island possessions of the United States, and who have received full pay therefor, the difference between sea pay and shore pay for the entire period of such service.

"Believing that it was the intention of Congress to place naval officers assigned to such duty upon an equal footing with army officers similarly situated, it is recommended that the statute be so amended as to afford the desired relief." (Report of Secretary of the Navy for 1900, p. 8.)

In consequence of these recommendations, Congress inserted the provision just quoted in the naval appropriation act of 1901.

The Court of Claims has pointed out its object in *Irwin*

v. *United States* (38 C. Cls. 87; see particularly foot of p. 100). It is simply to cure a misconstruction by the Comptroller of the Treasury of the expression "shore duty beyond seas" as used in the second proviso to Section 13 of the Personnel Act. Neither the original proviso nor this legislative construction of it contains anything affecting the pay of an officer on sea duty. Certainly nothing in the exceptional grant of full pay for shore duty when performed beyond seas indicates in the remotest manner an intention of Congress to deprive an officer of the Navy performing his normal duty at sea of the full pay allowed to an officer of the Army.

So, too, this provision so far as applies to the officers and enlisted men of the Marine Corps, was passed to cure a specific evil which Congress was called upon to correct.

The Secretary of the Navy said (Annual Report, 1900, pp. 8, 9), in immediate sequence to the passage we have already quoted (rec. pp. 153, 154):

"In this connection attention is invited to the hardships suffered by officers and men of the Marine Corps detailed to shore duty in Guam or in China. The Army appropriation act, approved May 26, 1900, provides that 10 per cent additional pay shall be given to officers and 20 per cent additional pay to enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and the Territory of Alaska. This provision is applicable to the Marine Corps, but, being specific in its terms, is limited to the places designated, and is not operative elsewhere. Consequently, officers and men of the Marine Corps who were sent to Guam or China from Porto Rico, Hawaii, the Philippine Islands, or Alaska, lost the increased pay given by the act of May 26, notwithstanding the fact that they were subjected to the additional expense and hardships attendant upon foreign service."

The proviso to the act of 1901 so far as it applies to officers and enlisted men of the Marine Corps, was passed in

response to this recommendation of the Secretary of the Navy. It can therefore be construed as neither an implied repeal nor a legislative construction of the act of May 26, 1900, in a particular not brought to the attention of Congress.

Much less can it be held either to repeal or to construe the act of March 2, 1901, which went through its legislative stages concurrently with but independently of that of March 3, 1901.

The irrelevancy of this act to the case now under discussion will best be seen by stating separately the sequence of events relating to this case and the sequence in relation to the question of shore duty beyond seas.

The sequence in relation to the present case is—

1. The act of March 3, 1899, Section 13, opening clause, grants army pay to naval officers.

2. The acts of 1900 and 1901 increase the pay of army officers serving in certain localities.

3. Naval officers serving at sea in the same localities are denied by the Comptroller to be entitled to the increase granted the army officers.

4. They bring suit in the Court of Claims to obtain the benefit of the increase.

In relation to the full pay of an army officer for "shore duty beyond seas" the sequence is as follows:

1. The act of 1899, § 13, second proviso, gives to officers of the Navy on "shore duty beyond seas" the full pay of army officers.

2. Such full pay is denied by the Comptroller to officers on shore duty in the Philippine Islands.

3. The Navy Department recommends to Congress to overrule this construction of law.

4. Congress passes the act of March 3, 1901, to produce this result.

The purpose of that act is plain.

Is it to be inferred that by accident it has made an unintentional exception to the fundamental principle of equality of pay by the Personnel Act? If so, it would be the first discrimination ever made by any statute of the United States in the direction of giving a naval officer higher pay for shore duty than for sea duty.

The general rule is the precise opposite. (*Rodgers* v. *United States*, 185 U. S. 83, 92.) And where a statutory policy is long established legislation is generally construed in harmony therewith. (*Shurtleff* v. *United States*, 189 U. S. 311, 316.)

Seamen's Pay Immaterial.

It has also been argued in opposition to this claim that because § 1569 of the Revised Statutes authorizes the President to fix the pay of petty officers and enlisted men in the Navy and neither the President nor Congress has seen fit to increase the pay of those persons, therefore the officers of the Navy should not have an increase.

This reasoning could only be regarded as having force if the pay of the commissioned officers of the Navy were assimilated or proportioned by law to that of enlisted men. The statutory ground of comparison, however, of pay of naval officers is with that of army officers, not of navy enlisted men. It is useless to speculate as to why neither Congress nor the President thought fit to increase the pay of enlisted men in the Navy. Presumably it was because they were thought to be getting enough already.

Precedents.

Some precedents bearing on this question should now be reviewed in order to complete the record. They show that whenever a like question has arisen the ruling has been in accordance with that now asserted on behalf of the claimant.

Analogy of Marine Corps.

The provision of the Personnel Act assimilating the pay of the Navy to that of the Army, *ante*, page 8, is in language borrowed from that so assimilating the pay of the Marine Corps. This act was originally passed in 1834, and is now embodied in Revised Statutes, § 1612, as follows:

"The officers of the Marine Corps shall be entitled to receive the same pay and allowances, and the enlisted men shall be entitled to receive the same pay and bounty for re-enlisting, as are or may be provided by or in pursuance of law for officers and enlisted men of like grades in the infantry of the Army."

In *United States* v. *Freeman* (3 Howard, 556) this court held that the following items of pay and allowances of the Army must be granted or denied to the Marine Corps according as they are granted or denied to the Army.

1. Pay according to brevet rank of officer commanding separate post;
2. Double rations to brevet field officer commanding separate post;
3. Extra pay of ten dollars a month to brevet officer commanding a company on account of responsibility for clothing, etc.

See also the opinion of *Mr. Justice Woodbury* in the Circuit Court after the case was remanded for new trial. (25 Fed. Cases, No. 15,163, p. 1211; 1 Woodbury & Minot, 45.)

In *Reid* v. *United States* (18 C. Cls. 625) it is said of the Marine Corps (p. 636):

"The pay of this corps is regulated by the laws which govern the pay of the Army, and as changes are made in the army pay, those changes take effect simultaneously

in the pay-roll of the Marine Corps. This is the legal effect of section 1612 of the Revised Statutes," etc.

In *Walton* v. *United States* (31 C. Cls. 196) the court says (p. 204):

"We rest the claimant's right to recover the additional pay of $2 per month provided by § 1284, as extended and made applicable to the enlisted men in the Marine Corps by § 1612, holding as we do that the enlisted men in the Marine Corps are on the same footing as 'enlisted men of like grades in the infantry of the Army,' both as to their regular pay and the $2 per month additional pay provided for by § 1284."

Opinion of Attorney-General Butler.

Attorney-General Butler in 1839 advised the Secretary of the Navy as stated in the syllabus, 3 Op. Attys.-Gen. 265:

"By the application of the act of the 2d of March, 1827, to the Marine Corps an assistant quartermaster of marines was entitled, prior to the 30th of June, 1834, to all the extra pay and emoluments and allowances allowed to an assistant quartermaster in the Army similarly situated."

Opinion of Attorney-General Johnson.

A case coming even closer in analogy to the application of the acts of 1900 and 1901 to the Navy is found in an opinion by Reverdy Johnson when Attorney-General. He thus advises the Secretary of the Navy in 1849:

"Sir: I have considered the question submitted by you to this office, as to what is the proper construction of the joint resolution of the 10th of August, 1848, (Session acts p. 225,) making certain provisions for the officers, &c., of the Marine Corps 'who have served with the army in the war with Mexico.' (9 Stat. L. 340.)

"Two battalions of the corps, under the separate com-

mands of Lieutenant-Colonel Watson and Major Harris were, as you inform me, 'detached from the Navy, and transferred *pro tempore* to the army,' to serve with it, under Major General Scott's command, in the war. That these are entitled to the benefit of the resolution, is considered by you, and properly 'as clear and indisputable'; but the doubt is, whether any other part of the corps is entitled. Upon this point, my opinion is decisive. With all proper deference to the judgment of your predecessor in the department, who, as I understand, gave the resolution that limited construction upon which as yet it has been executed, my opinion is that such construction is neither consistent with its spirit nor language. The interpretation I give it is, that all the officers, non-commissioned officers, privates, and musicians of the corps who belonged to the vessels of the United States despatched to the Mexican coast, to aid in subduing the cities and ports of the enemy, and conquering the country, and who were there for the purpose, are equally embraced by the resolution with the particular detachments under Lieutenant Watson and Major Harris.

"All that is necessary to bring any portion of the corps within the scope of the provision is, that they should have 'served with the army in the war with Mexico.' Whether such service was on the land or on the water, if it were rendered in connection or association with the army, and to effect a common end—victory over and conquest of the enemy—it was 'serving with the army in the war.' The resolution prescribes no particular theatre of service. It is couched in general terms. Neither land nor ocean is, in any way, in words referred to. It is service generally, anywhere, and in any mode, during the war, in union with the army, that is intended to be provided for." (5 Opinions of Attorneys-General, 155, 156.)

And he concludes (p. 158):

"I answer your inquiry, then, by saying that, in my opinion, the entire portion of the Marine Corps, whether serving on land, or on board ship on the Mexican coast, in the Mexican war, are to be considered within the true meaning of the resolution of the 10th of August, 1848, as

having 'served with the army in the war with Mexico' and entitled to the 'bounty land and other remuneration' it provides."

Much stronger is the present case. There is here no requirement that the officers of the Navy shall be "with" the Army but only that all changes made in the pay of the Army shall take effect simultaneously upon that of the Navy.

Opinion of Attorney-General Cushing.

A case bearing especially upon the construction of the words "in the Philippine Islands" and "in China" as including sea service in the waters of those countries came before Caleb Cushing as Attorney-General in 1855 (7 Opinions, 299). An act was passed granting increased pay to officers and men of the Navy "who served in the Pacific Ocean on the coast of California and Mexico," since September 28, 1850. By a later act the same pay was granted for a previous period. The proper construction of the phrase quoted was submitted to the Attorney-General. He said (p. 301):

"It appears by the report of the Fourth Auditor, that when these acts came up for execution, careful consideration was given to the question, arising on the face of the act of August 31, 1852, as to the meaning of the very phrase now under examination, namely,— 'who served in the Pacific Ocean, on the coast of California and Mexico.'

"On the one hand, the specification of 'the coast of California and Mexico' seemed to confine the applicability of the act to the case of persons serving in a very limited range of the Pacific Ocean.

"On the other hand, it was found all but impossible to enter into discrimination of the precise times when a ship was cruising on the coast of the Mexican Republic, and when she was not actually on that coast, but still cruising in the Pacific Ocean, with more or less of reference to

the war; sometimes in harbor, sometimes cruising immediately on the coast, sometimes going from or returning to it, according to the condition of the weather or the exigencies of the service. Besides, it was perceived that 'coast' was a term of some vagueness or indefiniteness of construction.

"With these impressions present in the mind, the Secretary of the Navy and the proper officers of the Treasury proceeded to reflect on the liberally remedial objects of this series of acts of Congress, and came to the conclusion, on the whole, that the term 'Pacific Ocean' was employed in the act to distinguish from 'the Atlantic,' and that of 'the coast of Mexico and California' to distinguish from the cruising ground, and points of attention, of the ships on the coasts of China and the East Indies."

His conclusion was (p. 303)—

"as the act of 1853 was but a continuation back of the period of compensation for the same service, and as Congress must be intended to have had full knowledge of how those descriptive words of service had been construed by the Department, it seems to me that the repetition of the words constitutes a legislative adoption and sanction of that construction of the Department."

The construction given to that act is entirely applicable to the expressions of locality used in the acts of 1900 and 1901, particularly to support the construction of the words of place used in the act of 1900 as including the adjacent waters.

Decision of this Court on Sea Ration.

The recent decision of this court in *Gibson* v. *United States* (194 U. S. 182, 191, 192) has a decisive bearing upon this case. The claimant there urged that he was entitled to the old navy allowance of a sea ration on the ground that the new law in giving him army pay and allowances provided no substitute for the sea ration,—an allowance peculiarly appropriate to the Navy, for which

no army equivalent could exist. It was contended that there was no inconsistency between the new pay and allowances and the sea ration, and that therefore the act granting the ration could not be considered as repealed.

This court, following the Court of Claims, disregarded the argument derived from the appropriateness of the allowance and the hardship of taking it away, and held that Congress meant to substitute the entire system of army pay and allowances for the system of navy pay and allowance. It was held that no ration can be allowed to an officer of the Navy while at sea for the reason that no such allowance is made to an officer of the Army.

The situation is here reversed. The naval officer claims while at sea the exact pay which an officer of the Army would receive in like official circumstances. He is met by the same argument which has been already overruled when set up in his favor in claiming the ration.

It is now argued for the United States that the naval officer can not receive the ten per cent increase because that increase is peculiarly applicable to duty performed on land by an officer of the Army. Thus he has lost the allowance made to him by the old law for being on ship-board separated from his family and at an increased expense of living; while at the same time the Government contends that he can not receive the increase of ten per cent, the only statutory condition of which is "serving beyond the limits of the States comprising the Union" and the contiguous Territories.

If the words "same pay and allowances" are of sufficient force to deprive the naval officer of his sea ration because it is not received by an officer of corresponding rank in the Army, the same words are sufficient to give him the increase of pay which an officer of corresponding rank in the Army serving in the same places in like official circumstances is entitled to receive.

The Case Mathematically Stated.

In taking the pay of an army officer serving within the United States as the standard or one hundred per cent, we may thus compare army and navy pay:

I. Officers on duty within the States of the Union and contiguous Territories:

Army pay	100 per cent
Navy pay	100 " "
except (act of March 3, 1899, § 13, first proviso) *when on shore* . .	85 " "

II. Officers on duty beyond the States of the Union and contiguous Territories:

Army pay	110 " "
Navy pay	110 " "
except (as contended in this case) *when at sea*	100 " "

The exception under the first class is made by direct statutory command; for the proposed exception under the second class, no statutory authority can be cited. This is the more striking since it is opposed to the long-established statutory system of paying more for sea than for shore duty. (*Rodgers* v. *United States*, 185 U. S. 83, 92.)

It is this exception which we are now asking the court to declare unauthorized by law.

An Executive Amendment.

To support the construction given to the act of March 2, 1901, by executive authority, it has been found necessary to introduce new words into the text of the statute as officially published. In the annual Navy Register and other official publications of the Navy Department the act reads as follows:

. "That hereafter the pay proper of all officers and enlisted men serving (on shore) beyond the limits of the States comprising the Union and the territories of the United States contiguous thereto, shall be increased ten per centum for officers," etc. [continuing as in the proper text of the statute, *ante*, p. 9]. (Circular No. 8, Bureau of Supplies and Accounts, September 15, 1902, p. 96; Navy Register, January 1, 1904, p. 209, Note 2[a].)

The words "(on shore)" are not in the text of the act as enacted by Congress. They are officially introduced.

A construction of a statute which requires the insertion of words in the text in order to make the text conform to the construction is legislation, not interpretation.

Summary.

We regret the length of this argument. The discussion has been prolonged only because the defense consists in an attempt to evade the plain meaning of the statutes involved.

As the act of 1899 grants to naval officers the pay of army officers, they are entitled to receive the increased pay allowed to army officers by the acts of 1900 and 1901, when they are serving in the localities named in these acts as those in which service of army officers entitles them to the increase.

PART II.

Mode of Calculating Increase.

The right of the claimant to an increase of ten per cent being assumed as established, the next question is how that increase is to be calculated. The solution of this question depends upon the construction placed upon the term "pay proper" as used in the acts of May 26, 1900, and March 2, 1901.

Statutes.

The claimant is a captain of more than fifteen years' service in the Navy. He corresponds in rank to a colonel of similar length of service in the Army (Revised Statutes, § 1466).

The following are the material provisions of the Revised Statutes in regard to the pay of such an officer:

"Section 1261. The officers of the Army shall be entitled to the pay herein stated after their respective designations; * * * Colonel: $3,500 a year. * * *

"Section 1262. There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service."

[Amended by Act of June 30, 1882 (22 Stat. L. 118), to provide that the increase "shall be computed on the yearly pay of the grade."]

"Section 1263. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law.

"Section 1267. In no case shall the pay of a colonel exceed $4,500 a year, or the pay of a lieutenant-colonel exceed $4,000 a year."

The claimant therefore receives the maximum pay permitted by Section 1267 to be received by a colonel in the Army, $4,500. That sum is composed of the yearly pay of the grade fixed by Section 1261, $3,500, and longevity increases granted by Section 1262, as amended by the act of 1882, and as limited by Sections 1263 and 1267, $1,000.

Is the ten per cent increase of "pay proper" to be computed on the yearly pay of the grade or on the entire pay including longevity increases?

The Court of Claims decides that the entire pay, including longevity increases, constitutes "pay proper," and should therefore be taken as the basis for computation of

the ten per cent increase allowed by the acts of 1900 and 1901. (Record, p. 24, last complete paragraph on page.) The appeal of the United States questions the correctness of this conclusion.

Opinion of Court of Claims.

The opinion of the Court of Claims in this case (p. 24) refers to that rendered by the court in *Irwin* v. *United States* (38 C. Cls. 87). The material portion of that opinion is as follows (38 C. Cls. 101–103):

"But the question is whether the increase shall be calculated upon the minimum pay of the grade or upon the total pay, including longevity increase. In other words, shall the increase be computed upon $2,500, constituting the lowest pay of a lieutenant-commander, or upon $3,500, constituting the total pay which carries the amount of the longevity increase?

"The proper determination of the question depends upon the true meaning of the words 'pay proper' as they appear in the statute.

"It is insisted by the defendants that in using the words 'pay proper' the minimum pay of the grade is the true basis of calculation. That is the construction of the accounting officers (4 Comp. Dec. 668, and 6 Comp. Dec. 944).

"The want of any statutory definition or direct judicial determination involves the matter in doubt as to whether 'pay' and 'pay proper' are equivalent, and whether the word 'proper' refers to any special kind of pay or only means that compensation which is properly called 'pay.'

"Military lexicons disclose differences between pay and allowances to officers. These differences nowhere appear more clearly stated than in *Sherburne's case* (16 C. Cls. R. 491), in which, quoting from Scott's Military Dictionary, it is shown that—

"'Pay is a fixed and direct amount given by law to persons in the military service in consideration of and as compensation for their personal service. Allowances, as they are now called, or emoluments, as they were formerly

termed, are indirect or contingent remuneration which may or may not be earned, and which is sometimes in the nature of compensation and sometimes in the nature of reimbursement.'

"In *Tyler* v. *United States* (16 C. Cls. R. 223) the method of computing longevity pay prescribed by Section 1262 of the Revised Statutes was declared to be not by taking one-tenth of the officer's fixed annual pay, but one-tenth of his current yearly pay; that is, his second longevity pay to include 10 per cent of his first longevity pay, subject to another provision limiting the total amount of such increase to 40 per cent of the fixed annual pay. In affirming this judgment, Mr. Justice Miller, for the Supreme Court, said that—

"'The words "current yearly pay" require that when the increased pay for any period of five years is to commence the 10 per cent must be counted on the regular salary added to its increase by any previous periods of five years; so that the original salary of the rank and any additions of 10 per cent previously earned for periods of five years constitute the current yearly pay on which said 10 per cent is to be calculated.' (105 U. S. 244, 246.)

"In *Emory* v. *United States* (19 C. Cls. R. 255) it was held that the 'three months' extra pay' given to those who served in the war with Mexico, by the acts of 1848 and 1879, is pay proper, not pay and allowances. This opinion treats 'pay' and 'pay proper' as interchangeable terms.

"An officer's pay implies a pay subject to change. When the longevity increase attaches it is as much of the officer's proper pay as the amount first fixed.

"Pay proper is pay regulated by service. It depends upon the officer's longevity. Longevity arises out of length of service and is founded on that. The pay proper in such a case is determinable upon an officer's lustrum—the amount he is to receive for every five years' period of service.

"Longevity pay provisions are a legislative convenience. They go hand in hand with the officer's pay as the years add to his term of service. These provisions say in effect that a major shall receive, during the first

five years of service, $2,500; during the second, $2,750, etc. Thus longevity pay is as fixed and certain as if actual amounts had been named.

"From these views we think that the computation made upon the minimum pay of the grade is erroneous."

Executive and Legislative Precedents.

The Court of Claims refers in the course of the above opinion to a decision of the accounting officers (4 Comp. Dec. 668) adverse to this definition of pay proper. The departmental and legislative precedents cited in that decision are all in favor of the definition upheld by the Court of Claims. We quote therefrom as follows (4 Comp. Dec. 670, 671):

"The term 'pay proper' seems to have been employed in the earlier decisions and opinions as a means of distinguishing with greater accuracy between 'pay' and 'allowances.' On August 15, 1852, Second Comptroller Phelps, in passing upon a claim for emoluments or allowances under a private act granting thirty-five years' half-pay, used the following language:

"'The term "half pay" is one that is very commonly used in our statutes, and has long ago acquired in commerce, as well as at the Departments and in the courts, a distinct and well-understood legal significance. It has always been construed to mean half the *pay proper* of the officer, exclusive of his emoluments and allowances, which are entirely distinct from the pay, are greater in amount, authorized by different enactments, and payable out of other appropriations.

"'A familiar instance of this construction will be found in the numerous military and naval half-pay pensions which have always been understood as authorizing half-pay proper.'

"In computing the three months' extra pay given by the act of July 19, 1848 (9 Stat. 248), for service in the war with Mexico, it was the rule to include only what the soldier was entitled to receive by way of stated compensation, as distinguished from allowances or emoluments;

and, in order to more clearly define the distinction, the words 'pay proper' were used in the decisions construing said act. The words 'pay proper' were apparently first used in legislation in section 4 of the act of March 3, 1865 (13 Stat. 497), which granted an addition of three months *pay proper* to certain officers of the volunteer army who should serve to the end of the war, to be paid on their discharge. The words were also used in section 1, act of March 2, 1867 (14 Stat. 422), granting an increase of 33⅓ per cent of the *pay proper* of certain officers of the Army for two years after July 1, 1866. In computing the three months' pay proper under the act of March 3, 1865, where an officer was discharged after July 1, 1866, and was therefore entitled to the one-third increase provided for in said act of March 2, 1867, such increase was included, thus treating it as a part of 'pay proper.' (Dec. Second Comptroller, Vol. 45, p. 129.) These cases are the only ones I have been able to find where the words 'pay proper' have been construed as including or excluding increased pay."

Dictionary Definitions.

The use of the term "pay proper" as meaning whatever is in a proper sense pay is in strict accord with the definition of the word "proper" found in the dictionaries, as follows:

Webster's Dictionary:

"*Proper:* 6. Rightly so called; strictly considered; as Greece proper; the garden proper."

Century Dictionary:

"*Proper*—5. Rightly so called, named or described; taken in a strict sense, usually following the noun, as the apes proper belong to the Old World. No shell fish are fishes proper.

"'This elevation descended into what might be called the garden proper.' Scott, Waverly, IX.

"'It is safe to assert that no government proper ever had a provision in its organic law for its own termination.' Lincoln in Raymond, p. 614."

Standard Dictionary:

"*Proper*—*A.* Conceived according to the strict definition or application of the term; understood in the most approved or correct sense; commonly following the noun modified.

"'A mere physical affection of the organism does not constitute a sensation proper.' Spencer Psychology, vol. ii, § 353, p. 246."

We find that the word "proper" is merely intensive to the noun qualified; that the term "pay proper" has been used by the departments and the courts to distinguish pay from emoluments or allowances, and that this court has decided that the longevity increase is a part of the "current yearly pay."

Longevity increase is nowhere treated by military authorities as an emolument or allowance, but always as a part of the pay. (Scott's Military Dictionary, words "Pay" and "Allowances"; 10 Opinions of Attorneys-General, 284; Digest of Opinions of Judge Advocate-General of the Army, Revised Edition, 1901, Paragraphs 1894, 1969.) Not being an allowance, it is a part of the pay itself, or of the "pay proper." The decision of the court below on this point should therefore be affirmed.

PART III.

Full Pay in Transit and Receiving Orders.

The Court of Claims finds the facts upon this branch of the case as follows (Findings II, III, Record, p. 6, the order being slightly transposed to make a consecutive narrative):

"Claimant was relieved as commanding officer of the *Lancaster* December 2, 1899, and ordered to report to the Navy Department.

"When relieved as commanding officer of the *Lancaster*, the vessel was at Barbados, West Indies. The claimant

took the merchant steamer *Wordsworth* from Barbadoes to New York. He reported at the Navy Department December 12, 1899. On December 13, 1899, he was ordered to proceed to Hongkong for duty on the Asiatic Station, and sailed by merchant steamer sailing from San Francisco, January 6, 1900. He reported in obedience to said orders and was assigned to the command of the U. S. S. *Baltimore* February 7, 1900. April 16, 1900, he was detached from the *Baltimore* and ordered to command the U. S. S. *Brooklyn*, April 17. On March 26, 1901, he was ordered detached from the command of the *Brooklyn* on reporting of his relief and ordered to the command of the U. S. S. *Oregon*. He was detached from the former vessel April 4. On April 5 and 6, 1901, he was traveling from Cavite to Hongkong on the merchant steamer *Esmeralda*, and reported on the latter vessel April 7, of which he remained in command until *July* 6, 1901."

The Personnel Act, Section 13, first proviso, *ante*, page 4, provides: "That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty." This reduction of fifteen per cent was enforced against the claimant between December 2, 1899, when relieved as commanding officer of the U. S. S. *Lancaster*, and February 7, 1900, when he took command of the U. S. S. *Baltimore*, at Hongkong; also on the 5th and 6th days of April, 1901, when traveling on a merchant steamer from Cavite to Hongkong in changing command from the *Brooklyn* to the *Oregon*.

Was this deduction warranted, or is he entitled to full pay during all or any part of the time named?

The Court of Claims decided in the original opinion (Paragraph 2, p. 12) against the claimant on this point. Mr. Chief Justice Nott delivered a dissenting opinion relating entirely to this question (pp. 18–21). To the opinion by Judge Peelle on the rehearing, the adverse ruling on this item of claim is adhered to (end of opinion,

p. 25). This item forms the sole subject of the assignment of error by the claimant on his cross appeal.

The Question Involved.

The opening clause of the Personnel Act of 1899, *ante*, page 8, grants in general terms the pay of army officers to the line officers of the Navy. The first proviso provides: "That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty"; while the second proviso restores full pay to officers "detailed for shore duty beyond seas." The question, therefore, is whether the claimant in this case was during the periods under discussion "on shore"; and if on shore whether he was during any part of the time on "shore duty beyond seas."

The periods involved may be thus classified:

1. While traveling from Barbados to New York on a merchant steamer.
2. While traveling by land from New York to Washington and from Washington to San Francisco.
3. While reporting and receiving orders at the Navy Department.
4. While traveling by merchant steamer from San Francisco to Hongkong.
5. While traveling by merchant steamer from Cavite to Hongkong.

Traveling by Sea.

During three of these five periods, the claimant was literally not "on shore." He was at sea, traveling under orders on merchant vessels: December 2 to 11, 1899, from Barbados to New York; January 6 to February 7, 1900, from San Francisco to Hongkong, and April 5 and 6, 1901, from Cavite to Hongkong.

The Rule as to Provisos.

As the act of 1899 by its opening clause establishes a rate of pay for officers in the Navy, and then by a proviso carves out an exception to this rate, the general rule laid down by Mr. Justice Story in *United States* v. *Dickson* (15 Peters, 141, 165) for the construction of provisos should apply:

"We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof. Applying this rule to the circumstances of the present case, how does it stand? The enacting clause gives to each receiver a commission of one per cent upon all the public moneys received by him. This was precisely in conformity to the antecedent laws. The proviso limits that percentage to an amount not exceeding $2,500 for any one year.

"Until, then, the percentage of the particular receiver has reached that amount, in whatever period of the year it may arrive, the proviso, according to its very terms, has no operation; and when that maximum is reached, the percentage ceases, whether any more public moneys are received by that officer or not. The case, then, of the present receiver falls directly within the enacting clause. He seeks only the maximum commission upon the moneys actually received by him during his continuance in office; and the proviso either does not touch his case, or it only operates to cut off all subsequent commissions from him, for other moneys received during his continuance in office. The proviso contains no limitations of his percentage, by connecting it with, or making it dependent upon the commissions, or the receipt of public

moneys by his successor in office. The proviso is, that he shall receive no more for any one year; not that any other receiver may not receive a like compensation accruing from his subsequent appointment and receipts in office, for the portion of any year which is then unexpired."

Applying this rule to that portion of the time during which the claimant was on a merchant vessel at sea, he clearly can not be taken by the proviso out of the general operation of the enacting clause; for he was not in any sense of the term "on shore."

Statutory Definition of Sea Service, etc.

But it is insisted on behalf of the United States that the service in question was none of it "sea service" within the definition of Section 1571 of the Revised Statutes:

"Section 1571. No service shall be regarded as sea service except such as shall be performed at sea, under the orders of a Department and in vessels employed by authority of law."

In response to this it may first be remarked that an examination of this provision in the act of June 1, 1860 (§ 3, 12 Stat. L. 27), from which the provision of the Revised Statutes is taken, indicates its primary purpose to have been rather that of fixing the amount of credit for sea service than of fixing the pay while on such service. Pay was by that act graded according to the length not merely of service but of sea service. A lieutenant, for instance, had different rates of pay (p. 24) "after he shall have seen seven years' sea service in the Navy," and nine, eleven and thirteen years' sea service, respectively.

The same act of 1860 created different rates of pay for officers "on duty at sea," "on other duty" and "on leave or waiting orders."

The act of July 15, 1870 (16 Stat. L. 321), by its third section (pp. 330–332) enacted a new pay table, fixing different rates of pay "when at sea," "on shore duty," and "on leave or waiting orders," respectively. This pay table of the act of 1870 was carried into Section 1556 of the Revised Statutes. The definition of "sea service" made by the act of 1860 was not carried into the act of 1870. It was however regarded by the revisers as in force, and carried into the Revised Statutes as section 1571.

Even after 1870, however, and down to the passage of the Personnel Act, the terms ordinarily used in the Navy were still "sea pay" and "other duty pay" as contained in the act of 1860. (See Navy Regulations, 1896, Articles 1155, 1158, 1159.) In view of the provisions of Section 1571, defining sea service, this no doubt was a proper distinction.

Definition no Longer in Force.

The act of 1899 established a new system. Instead of fixing different rates of pay for different classes of duty and defining the classes, it fixes a general rate of pay without definition of the conditions, but leaving them to be gathered from the acts defining the pay of the Army. This general rule is followed by a special exception of officers "when on shore," reducing their pay by fifteen per cent. This again is followed by an exception to the exception, restoring the full pay of an army officer to officers on shore duty when that shore duty is performed beyond seas.

Thus there are only two rates of pay; one of them, the general or normal rate, being that fixed by the army statutes; the other, the rate "when on shore" if not "beyond seas."

For "leave or waiting orders" pay, reference must now

be had to the Army Statute (Revised Statutes, § 1265), which gives "full pay" to officers "waiting orders."

In *Gibson* v. *United States* (194 U. S. 182, 192) this court held that this act was intended as a complete substitute for the previous pay statute.

This rule is just as applicable to the definition of sea service contained in Section 1571 of the Revised Statutes as it is to the allowance of sea ration granted by Sections 1578 and 1585 which was then specially under consideration.

Sea service is no longer a condition of receiving full pay. Section 1571 therefore has no application. Hence the claimant, while traveling on duty on a merchant steamer at sea was entitled to full army pay because not "on shore" within the meaning of the Personnel Act, or indeed in any sense of the term.

If Shore Duty, it is Beyond Seas.

His right to full pay on merchant steamers is, however, not affected even if Section 1571 remains in force. If the claimant was not during the time of so traveling engaged in "sea service," he was necessarily "on shore." As he was traveling on duty under orders, he was on "shore duty." While at sea outside the Territories of the United States, he was "beyond seas." That term is defined by the Court of Claims in *Irwin* v. *United States* (38 C. Cls. 87) where many authorities are cited (pp. 95–100).

The second proviso of Section 13 of the Personnel Act, *ante*, top page 9, declares that naval officers "detailed for shore duty beyond seas" shall receive the full pay of army officers. The service can not be treated as shore service for the purpose of taking away a part of the pay under the first proviso, and as not shore service for the purpose of restoring it under the second.

Summary.

The status of the claimant on his three voyages on merchant steamers was therefore as follows:

1. He was not "on shore," and consequently not within the exception to full army pay.

2. But if he was "on shore," then he was on "shore duty beyond seas," and therefore entitled to full pay as provided by the second proviso to Section 13 of the Personnel Act.

For the two days constituting the last voyage involved, April 5 and 6, 1901, he is, if entitled to full pay, also entitled to have the ten per cent increase under the act of March 2, 1901, calculated on his full pay instead of merely on shore pay. (Conclusion of Law, Paragraph 2, Record, p. 10.)

Land Travel—Reporting at Navy Department.

What is the proper rate of pay of the claimant while traveling across the continent between December 12, 1899, and January 6, 1900, en route from one sea duty to another, and during this time reporting under orders at the Navy Department?

The Court of Claims holds that during this time the officer was properly subjected to a reduction of fifteen per cent. It is submitted on the contrary, that to bring an officer within the proviso requiring a reduction of fifteen per cent "when on shore" there must be a definite assignment to shore duty. Such assignments are provided for by the act of March 3, 1883 (22 Stat. L. 472):

"Section 2. That hereafter no officer of the Navy shall be employed on any shore duty, except in cases specially provided by law, unless the Secretary of the Navy shall determine that the employment of an officer on such duty is required by the public interests, and he shall so state

in the order of employment, and also the duration of such service, beyond which time it shall not continue." (Modified by act of July 11, 1892 (27 Stat. L. 245), so as to provide that the orders "need not state the duration of such service.")

The words of the first proviso, "when on shore," in connection with those of the second proviso, "detailed for shore duty beyond seas," must be read in the light of the act just quoted.

The reduction of fifteen per cent was intended by Congress to take effect only upon an assignment to shore duty as contemplated by these acts. For all other service the officer remains entitled to the full army pay of the corresponding grade. It would be unreasonable to subject an officer to the loss of a part of his pay for a few days of transit from one sea duty to another sea duty, during which the officer was in part traveling and in part reporting at the Navy Department, presumably for the purpose of receiving instructions in regard to his sea duty. No public interest can be subserved and no intelligent purpose ascribed to Congress in the legislation by construing it as requiring a deduction of pay during brief intervals like these, amounting in some instances to as little as one or two days.

The dissenting opinion of the Chief Justice of the Court of Claims discusses this whole question so fully and ably as to relieve us from further extending this argument.

Other Decisions of the Court of Claims.

The Court of Claims has rendered two decisions, apparently inconsistent with that in this case.

In *Collins* v. *United States* (37 C. Cls. 222) the claimant was wounded while at sea and sent temporarily to hospital without being detached. The Navy Regulations for 1896, Paragraph 1154, provide: "An officer temporarily

absent from a ship in commission to which he is attached, shall continue to receive sea pay." It was held that the temporary absence of the officer from his vessel in hospital by authority did not deprive him of his right to sea pay.

In *Engard* v. *United States* (38 C. Cls. 712) the claimant while on sea duty was ordered to inland points for temporary duty in connection with the inspection of steel tubes for boilers of a vessel other than his own. It was specified "this duty is in addition to your present duty." On this duty he performed two journeys, and was absent in all 122 days from his vessel. It was held that he should not be deprived of his sea pay while temporarily ashore on this duty.

The principle underlying these decisions is that an officer's sea pay can not be reduced by temporary assignments to duty on shore not interfering with his general sea status.

The decisions are the more striking from the fact that both cases arose at a time prior to the passage of the Personnel Act, and therefore while Section 1571 of the Revised Statutes defining sea service was unquestionably in full force.

CONCLUSION.

It is therefore submitted that the judgment of the Court of Claims should be affirmed upon the following points:

1. That the claimant is entitled to ten per cent increase of pay while serving "in the Philippine Islands" and "in China" from May 26, 1900, to March 2, 1901, and "beyond the States comprising the Union and the Territories of the United States contiguous thereto" from March 2, 1901, to June 12, 1901.

2. That this increase should be calculated upon his entire pay, including longevity pay, and not merely upon the grade pay.

It is submitted that the judgment of the Court of Claims should be reversed on the following points, and that it should be held:—

3. That while the claimant was temporarily passing from one sea duty to another his full army pay continues; and—

4. That while traveling on merchant steamers he was not subject to a reduction of fifteen per cent as "on shore"; because he was either at sea or, if on shore, was "detailed for shore duty beyond seas," and in either event is entitled to the full army pay.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Charles M. Thomas,
Appellee in No. 94; Appellant in No. 95.

[redacted]

[redacted]

[redacted]

TABLE OF CONTENTS.

PAGE

The Pay Grade Increase of Pay Proper 1
Correction as to Rate of Payment 1
The Army Acts are General in Terms 2
Alleged Legislative Construction 3
Is Sea Duty Discriminated Against? 4
The Effect of the Act of March 2, 1901 5
The Caribbean Maneuvers as a Test 6
Army Duty Abroad Strictly Normal 7
Purpose of the Personnel Act 8
Views of Assistant Secretary of Navy Roosevelt 9
Report of House Committee on Naval Affairs 10
Application of These Views to Personnel Act 12
Mode of Calculating Increase 12
No Inequality with Army 12
Congressional Disapproval of Definition 13

IN THE

Supreme Court of the United States.

October Term, 1904.

THE UNITED STATES, *Appellant*,
v.
CHARLES M. THOMAS. } No. 94.

CHARLES M. THOMAS, *Appellant*,
v.
THE UNITED STATES. } No. 95.

Appeals From the Court of Claims.

BRIEF IN REPLY.

Ten Per Cent Increase of Pay Proper.

Correction as to Rate of Payment.

In the brief for the United States (paragraph at top of page 8), it is stated that the claimant as a captain in the Navy receives the sea pay of a captain allowed by the old law (Revised Statutes, sec. 1556), under the proviso of the Personnel Act (brief for U. S. foot of page 5): "That no provision of this act shall operate to reduce the present pay of any commissioned officer now in the Navy."

This is an error. The claimant as a captain receives the same pay as a colonel in the Army of similar length of service, under the opening clause of the Personnel Act (brief for U. S. pp. 4, 5), that is:

Minimum or grade pay, R. S. sec. 1261	$3,500
Longevity pay, after 15 years' service, R. S. secs. 1262, 1267	1,000
	$4,500

All captains in the Navy on the active list receive this as all have over fifteen years' service. The amount is the same as the old navy pay under R. S. sec. 1556. Therefore no question under the proviso referred to is involved in this case.

The Army Acts are General in Terms.

It is insisted on behalf of the United States (brief for U. S. pp. 9–12) that the acts of 1900 and 1901 (brief for Charles M. Thomas, claimant, pp. 9, 10) are not general legislation affecting all officers of the Army but affecting only "particular or specific officers serving in specific and designated localities" (brief for U. S. p. 10).

It is difficult to understand the meaning of the terms "particular or specific officers." The legislation is in every sense general in its terms. Every officer of the Army, while serving in the localities designated in the act of 1900, became entitled to the increased pay. So too every officer serving anywhere beyond the limits of the States and Territories becomes entitled under the act of March 2, 1901, to the increased pay while so serving. There is nothing special or particular about these acts. They merely designate the field of service for the application of the increase.

They are the same kind of general law as Rev. Stat. sec. 1578, which provides:

"All officers shall be entitled to one ration, or to commutation therefor, while at sea or attached to a sea-going vessel."

This provision was general and affected all officers of the Navy whenever they came within the condition designated in the statute of being at sea or attached to a seagoing vessel. This court has held that being general legislation relating to pay and allowances of commissioned officers of the Navy, it has been repealed by the general terms of Section 13 of the Navy Personnel Act, that officers of the Navy "shall receive the same pay and allowances" as officers of the Army. (*Gibson* v. *United States*, 194 U. S. 182, 191). The same line of argument leads irresistibly to the conclusion that an act which increases the pay of officers of the Army doing duty in a prescribed field of service is a general law affecting the Army which must necessarily be applied to the Navy also under the terms of the Personnel Act.

Alleged Legislative Construction.

This subject is treated at some length in the brief for the United States (pp. 13–19).

The Naval Appropriation Act of March 3, 1901 (31 Stat. L. 1108) has been discussed in our opening brief (pp. 33–38). This act declares that shore duty in the Philippines and elsewhere is "shore duty beyond seas"; it directs that the pay for such shore duty shall be the full 100 per cent already granted by the second proviso of the Personnel Act, §13, for such shore duty (brief for Thomas, claimant, top of p. 9), and not reduced to 85 per cent under the operation of the first proviso for officers "on shore" (brief for Thomas, claimant, foot of p. 8). It then incidentally adds, "with such additional pay as may be provided by law for service in island possessions of the United States" (brief for Thomas, claimant, p. 34). This clause recognizes the application of the existing act of May 26, 1900, and incidentally also of the contemporary act of March 2, 1901 (brief for Thomas, claimant, p. 9), to

the Navy, but does not undertake to determine, much less to limit, their scope.

That act relates to shore duty pay. Its object was to make a broad definition of the second proviso of the 13th section of the Personnel Act and to limit the scope of the first proviso (brief for Thomas, claimant, p. 8). It refers but incidentally to the ten per cent increase in its particular relation to the subject of the act, shore duty. The present claim arises out of services at sea and therefore depends on the opening clause of section 13, and has no relation to the provisos. It appeals for the general enforcement of the ten per cent increase in accordance with its terms.

The appropriation act of June 7, 1900 (31 Stat. L. 684), referred to in the brief for the United States (pp. 17, 18) as not having provided for the payment of this increase to officers of the Navy has no bearing on the discussion. The pay of the Navy is not, as in the Army appropriation acts, segregated into items. The first item in the act is:

"Pay and allowances prescribed by law of officers on sea duty; officers on shore and other duty; officers on waiting orders; officers on the retired list;" and after a number of other items, the total is given, $12,810,897.

As the appropriation is for "pay and allowances prescribed by law" it throws no light upon the question of what pay and allowances are so prescribed, but the law prescribing the pay and allowances must be referred to.

The same is true of all the subsequent appropriation acts, 1901 (31 Stat. L. 1107), 1902 (32 Stat. L. 662), 1903 (32 Stat. L. 1177), and 1904 (33 Stat. L. 324).

Is Sea Duty Discriminated Against?

The real question is, "Are officers at sea precluded by the character of their service from the benefit of the increase?" Does this act make an implied exception against officers at sea?

The construction demanded by the learned Assistant Attorney-General, if the pay of an army officer on duty in the United States is taken as 100 per cent, would allow to the officer of the Navy on shore duty beyond the States and Territories 110 per cent, and would give to the officer of the Navy on sea duty beyond those limits only 100 per cent. This would reverse the long continued rule of legislation never to grant less, and generally more, for sea than for shore service in the Navy, a policy stated by this court in *Rodgers* v. *United States* (185 U. S. 83, 92), and more elaborately by the Court of Claims in *Ryan* v. *United States* (38 C. Cls. 143) fully quoted in the brief for the United States (pp. 34–39).

Have we in this legislation a solitary example of a discrimination in favor of shore service and against sea service?

This court has held that "an extraordinary change in the usual ruling governing the tenure of office" is not to be presumed to have been intended by Congress "without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences." (*Shurtleff* v. *United States*, 189 U. S. 316). The same remark applies to a construction of acts of Congress which would result in giving an officer on shore duty ten per cent more pay than his brother officer serving at sea in the waters of the same locality.

The Effect of the Act of March 2, 1901.

It is suggested (brief for the United States, p. 19) that nearly all officers of the Navy on sea service are beyond the limits named in the statute and therefore, on the construction of the claimant, would receive ten per cent increase (foot of p. 20). Not only is no evidence offered in support of this mere assertion, but it is conclusively contradicted by official records fully summarized in our opening brief (pp. 28–32). The argument, being thus

contradicted by facts of record, needs but little further consideration.

The Caribbean Maneuvers as a Test.

The suggestion is made in the brief for the United States, pp. 19, 20:

"All those naval officers of that portion of our Navy which recently took part in the maneuvers in the Caribbean Sea and other places for drill and practice, would be entitled to the increase under claimant's contention."

This statement is true. It affords an excellent basis of comparison between the pay of officers of the Army and of the Navy serving beyond the limits of the United States. Officers of the Army on duty in Porto Rico, whether on the island or on army transports or merchant steamers or naval vessels in the vicinity, or in transit to or from the island, were during the time of these maneuvers in receipt of the ten per cent increase provided by the act of 1901. On the island they lived in quarters furnished by the Government, or received commutation therefor. The winter climate is delightful, and the country as peaceable as any region under the American flag; yet the Army officers received an increase of ten per cent on their pay.

The officer of the Navy engaged in these maneuvers had not even the option which the army officer has of taking his family with him. They must be left at home whether he wanted to or not. He was obliged to keep up two separate establishments, one at home, the other at his post of duty. No contribution was made by the Government to his mess bills as was done prior to the Personnel Act by way of the sea ration or commutation therefor. (*Gibson* v. *United States*, 194 U. S. 182, 192.)

He had another expense to which the army officer was

not subjected. Vessels of other nations were present at these maneuvers. Their officers were the guests of ours. No "table money," allowance for servants, or other such provision for expense of entertainment was provided by the Government for our officers, as is the case with other navies. (House Report 1375, 55th Congress, 2d Session, being report on bill which afterwards became the Navy Personnel Act, pp. 95–97.) All the expense of entertainment had to be provided from their own pockets.

Shall they be deprived of the one increase which the law allows to officers "serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto"? And if they are deprived of it while officers of the Army in the same locality are getting it, are they receiving "the same pay and allowances as the officers of corresponding rank in the Army"?

Army Duty Abroad Strictly Normal.

The whole defense of the United States, as disclosed by the able brief of the learned Assistant Attorney-General, is based upon the idea that the officers of the Army are performing some extra or abnormal duty in serving beyond the limits of the home States and Territories, while those of the Navy are doing only their ordinary and regular service.

A legal distinction can not, it is submitted, be based upon the idea of duty being either normal or abnormal. In fact, as well as in law, the duty in both services is strictly normal. The Army and the Navy together constitute the military force of the United States. The terms of their engagement in either service require them to serve wherever they may be ordered. The Army has always been regularly and usually employed in guarding our outlying possessions. Before the completion of the trans-

continental railroads a large proportion of the officers of the Army were always serving in regions far more difficult of access and less civilized than the Philippine Islands are to-day. For many years after the acquisition of Alaska, the Army was the sole representative of the authority of the United States in that country. For such services the officers of the Army received no increase of their pay any more than did those of the Navy. But there was nothing abnormal or unusual about the service, nor is there anything abnormal or unusual in the service of the Army in the Philippines, or other outlying regions to-day. The service is as much a part of their regular duty as is the service of the Navy in the waters of our outlying possessions or of foreign countries. Each is a part of the officer's expected and anticipated duty. Neither would have any legal ground of complaint if Congress had failed to increase the pay in consideration of such service. But when Congress does make service in such regions of the world a condition of increase in the case of the Army, the Personnel Act assures to the Navy the benefit of the same increase.

Purpose of the Personnel Act.

The achievements of our Navy in the war with Spain awakened Congress to the propriety of placing its officers upon an equality with those of the Army in the matter of compensation. Had the acts we are considering been in force at the date of the battle of Manila Bay, May 1, 1898, Commodore, now Admiral, Dewey and his fellow-officers who achieved for us the conquest of those islands, would have been entitled on the theory of the defense to less pay by ten per cent than the officers of the Army who came after them and followed up their victory. Congress recognizing the justice of a plea for equality between the two services, abolished the distinctions between them and directed that not only the existing pay table of the Army

but all future changes in that pay table should apply to the Navy.

Views of Assistant Secretary of Navy Roosevelt.

Hon. Theodore Roosevelt in a report made by him as Assistant Secretary of the Navy embodied in that of the House Committee on Naval Affairs on the bill which became the Personnel Act thus gave the reasons for recommending the adoption of the army pay table for the line of the Navy:

"Furthermore, the pay of the officers has been graded so as to make it equal to the pay of the other servants of the Government engaged in similar duties. At present the line of the Navy is the most poorly paid branch of the entire Government in proportion to the duties performed and the responsibilities involved. It is difficult to speak with proper restraint of a system which cuts down below the pay of all similar servants of the Government the scanty salaries of those men to whose valor, energy, and lifelong zeal the honor of the nation is especially entrusted. The engineers are paid at a much higher rate than the line officers; and in the event of the two corps being combined it is certainly desirable to raise the pay of the old line officers rather than to diminish the pay of the old engineers. All that has been done is to equalize matters by giving the new body the pay now granted to the marine officers and the Army. At present the anomalies in the Navy are grotesque. Out of a given number of graduates from Annapolis the men who go into the line—the men out of whom we are to make the Perrys, Footes, and Hulls of the future—are paid the smallest rate of all. The men who take charge of the marines are paid more, and most of all is paid to those who stay ashore to build the ships which the others handle.

"In one of the offices of the Navy Department at present there is on duty a graduate of Annapolis, a line officer who receives a salary of $2,400. One of the junior assistant constructors also on shore duty is this officer's

son, also a graduate of Annapolis some twenty-five years later than his father graduated. They will both receive a raise of pay next year, and their rates of pay will then be precisely the same. In the Department here at Washington one of the naval aids on duty graduated from Annapolis twenty-three years ago. One of the assistants who is in the construction department graduated six years ago. He receives $400 more than the naval aid, who was his instructor at the Academy during the period that he was there. Most emphatically there should be no cutting down in the salaries of any of the other officers; but those of the line officers should be raised. It must be remembered that with smaller salaries the line officers have greater calls made upon them. When our ships are abroad, or when foreign ships are in port, our officers often have to entertain the officers of foreign powers; and they are too proud of their ships not to do this entertaining in the way that it should be done, though it forms a very serious drain upon their slender purses." (House Report No. 1375, 55th Congress, 2d Session, pp. 28, 29.)

Report of House Committee on Naval Affairs.

The elaborate report submitted to the House of Representatives by Mr. Foss from the Committee on Naval Affairs, May 19, 1898, on House Bill No. 10,403, which with some amendments became the Personnel Act, says under the head of "Pay":

"The committee, after careful consideration, recommend that the pay of the new line should be made the same as that of the Marine Corps or the infantry of the Army. They believe that there could not be a more appropriate time for putting the pay question on a proper basis than the present, when the personnel of the Navy is being reorganized, in order that, all questions affecting the personnel having been settled by this bill, Congress would not be called upon to legislate for the Navy for a long time to come.

"The committee examined this question of pay with the greatest care and recommended the adoption of army

pay as provided in the original draft of the bill. The army pay table has been in use for a long time, and has given satisfaction to the officers who are paid under it. While there are features which doubtless admit of improvement, it is believed to be much better to adopt for the Navy a system which has already been applied satisfactorily for many years to a sister service than to attempt to prepare a new pay table, even if it might theoretically be more perfect than the one recommended.

"The following is a brief statement of some of the reasons which have convinced the committee:

"1. As an amalgamation of officers is being made who have heretofore been paid differently, and as their positions are to be the same, the adoption of some scheme of pay which will be fair to all is important.

"2. The adoption of either of the present pay tables would cause a reduction of pay to a great many officers of both branches.

"3. The present pay tables were devised twenty-five years ago to suit a condition of affairs then existing, but which has materially changed.

"4. Neither of the present pay tables is constructed on a really proper basis, and the amount of pay an officer will receive is almost a lottery—depending too much on variation in promotion.

"5. The Marine Corps (Army) pay table is based, partly at least, on length of service from the very commencement, a principle which any fair rate of pay should embody.

"6. This scheme has prevailed for at least thirty years in the Army and Marine Corps and has given great satisfaction.

"7. The ranks in the two services (Army and Navy) are the same, and the duties and responsibilities of the Navy are at least as great as those of the Army, so that in all fairness it would seem that the pay should be the same.

"8. Certain expenses incumbent on naval officers are, from the nature of their duty, greater than those of army officers, so that a greater rate of pay would be indicated. What is provided for is not quite equality, as all the allowances are not given.

"2. The adoption of a pay table for a similar military service obviates the necessity of a great deal of detailed work in preparing a new one, and makes the portion of a bill dealing with the subject short and easily understood." (House Report 1275, 58th Congress, 2d Session, pp. 9, 10.)

Application of These Views to Personnel Act.

It will be observed that one of the very reasons supporting the passage of such a measure in the opinion of the Committee was to obviate the necessity for pay legislation specially affecting the Navy. At the same time it was admitted (Paragraph 8 above) that "certain expenses incumbent on naval officers are from the nature of their duty greater than those of army officers," so that "what is provided for is not quite equality." Could there be a better answer to the suggestion made on behalf of the United States that the officer of the Navy at sea has not as great expenses to meet as the Army officer on shore?

The legislation is evidently of the very character designed by the framers of the Personnel Act to apply to the Navy.

Mode of Calculating Increases.

No Inequality with Army.

It is contended in this case on behalf of the claimant (brief for Thomas, claimant, Part II, pp. 46–52) that he is entitled to have his ten per cent increase calculated upon his entire pay, including all longevity increases. The officer of the Army has the same right. There is no force in the contention made in the brief for the United States (pp. 21–22) that there is an inequality of $200 a year between the army officer receiving his increase merely upon grade pay. The decision of the court on this question will affect the Army equally with the Navy.

Congressional Disapproval of Definition.

A decision of the Comptroller is cited in the brief for the United States (pp. 28–29) to show that the expression "pay proper" includes only the minimum or grade pay and excludes all longevity increases. The principal argument made in that decision is that Congress in the act making appropriation for the support of the Army for the year ending June 30, 1899, approved March 2, 1898, appropriated separately "for pay proper of enlisted men" and for "additional pay for length of service," thus contrasting "pay proper" and "additional pay for length of service."

This decision was rendered June 2, 1899 (2 Comptroller's Decisions, 888). At the very next session of Congress the form of appropriation was changed. In the appropriation act of March 3, 1899, it assumes this form (30 Stat. L. 1007):

"Pay of enlisted men of all grades, including recruits, fifteen million five hundred thousand dollars.

"For additional pay for length of service, seven hundred and twenty-five thousand dollars."

The same form of appropriation continues in the Army appropriation acts of May 26, 1900 (31 Stat. L. 206); March 2, 1901 (31 Stat. L. 895); June 6, 1902 (32 Stat. L. 331); March 3, 1903 (33 Stat. L. 1028), and April 23, 1904 (33 Stat. L. 264). Thus Congress seems to have recognized the impropriety of appearing to contrast "pay proper" and "additional pay for length of service." That form of expression was abandoned as soon as attention was called to it.

No such contrast was ever made in the appropriations for pay of officers. The form for such appropriation for a fiscal year so far back as the act considered by the Comptroller, that of 1899 (30 Stat. L. 1215),

"For pay of officers of the line, two million eight hundred and sixty-five thousand dollars.

"For pay of officers for length of service, to be paid with their current monthly pay, seven hundred and ninety thousand dollars."

This form has ever since continued, as shown by the appropriation acts referred to.

Thus Congress, both as to the officers and enlisted men, has shown no disposition to treat longevity pay as anything to be distinguished from "pay proper."

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Charles M. Thomas,
Appellee in No. 94; Appellant in No. 95.

OFFICE OF THE CLERK
RECEIVED
DEC 24 1904
SUPREME COURT U. S.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, *Appellant*,
v.
CHARLES M. THOMAS. } No. 94.

PETITION OF APPELLEE FOR REHEARING
AND
BRIEF IN SUPPORT THEREOF.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Appellee.

STATUTES.

NAVY PERSONNEL ACT OF MARCH 3, 1899, §3, 30 Stat. L. 1007.

[OPENING CLAUSE]

"SEC. 13. That, after June 30th, 1899, commissioned officers of the line of the Navy and of the Medical and Pay Corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army:"

[FIRST PROVISO]

"*Provided*, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty; but this provision shall not apply to warrant officers commissioned under section twelve of this Act:"

[SECOND PROVISO]

"*Provided further*, That when naval officers are detailed for shore duty beyond seas they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the Army detailed for duty in similar places:"

ARMY APPROPRIATION ACT OF MARCH 2, 1901, 31 Stat. L. 903.

"That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the States comprising the Union, and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto."

IN THE

Supreme Court of the United States.

October Term, 1904.

THE UNITED STATES, *Appellant*,
v.
CHARLES M. THOMAS. } No. 94.

PETITION FOR REHEARING.

Your petitioner, Charles M. Thomas, appellee in the above-entitled cause, prays for a rehearing and for reasons thereof assigns the following:

1. That "the Government made no appeal" (opinion, p. 6) from that portion of the judgment of the Court of Claims allowing the claimant mileage in the sum of $97.42, but this court has, notwithstanding, ordered this cause to be remanded with directions to dismiss the petition, whereas to be in conformity with the opinion, the judgment in favor of the claimant should stand for $97.42.

2. That this court held that the appellee was not entitled to the sum for which judgment was rendered by the Court of Claims in his favor, whereas the judgment of that court ought in law to have been affirmed.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Appellee.

Brief in Support of Above Petition.

Claim of the Appellee.

The claim made by the appellee as captain in the United States Navy and sustained by the court below was based upon two statutes.

Section 13 of the act of March 3, 1899 (30 Stat. L. 1007), says that officers of the navy shall receive the same pay and allowances as officers of the army. The act of March 2, 1901 (31 Stat. L. 903), says that the pay of officers of the army shall be increased ten per cent when serving beyond the limits of the United States.

The claimant, an officer of the navy, served beyond the limits of the United States. He was denied ten per cent increase and claimed it in this suit. His claim is therefore absolutely within the terms of these statutes.

The appellee is uncertain whether this position was made perfectly clear to the court. It is not stated in terms in the opinion and some passages hereafter quoted indicate that it was not fully apprehended as the basis of the claim.

Objections Sustained by the Court.

The opinion takes two grounds of decision against the right of the appellee to extra pay:

1. Naval officers when beyond the limits of the United States are engaged in their normal duties. Consequently Congress could not be supposed to intend to pay them more than the usual rate of pay.

2. Some provisions of statute sustain the theory that this army increase is not intended for naval officers at sea.

Construction of Court of Claims.

The opinion of this court says (p. 4):

"Under this proviso an army officer ordered to the Philippine Islands receives an increase of pay from the

day he leaves San Francisco until he returns there. This allowance was undoubtedly based upon the consideration that service both in the Philippines themselves and upon the voyage going and returning, was an exceptional service, attended by peculiar hardships; but to say that navy officers shall be entitled to the same increase is practically to add ten per cent to their sea pay from the moment they leave a port of the United States until they return thereto; in other words, to increase their normal sea pay ten per cent whenever they are serving beyond the limits of the States.

"So far as applied to naval officers, it goes further than this. The act of 1901 does not, as did the act of 1900, limit the increase of pay to officers serving in our island possessions and in Alaska, but extends it to all serving 'beyond the limits of the United States,' so that if applied to naval officers, whenever a vessel is ordered to sea beyond the three-mile limit, be it only upon a practice cruise or a voyage from Pensacola to New York, every officer on such vessel is entitled to a ten per cent increase of his ordinary pay from the day he sets sail until the day he returns.

"It is not for a moment to be supposed that Congress contemplated any such sweeping innovation."

To ascertain the meaning of an act of Congress, it must first be read according to the natural meaning of its terms. If two meanings are consistent with its terms, one leading to a sensible, the other to an absurd, construction, the former must be adopted. No construction contrary to the plain meaning of the terms is to be admitted unless the natural construction is so absurd that Congress can not be supposed to have intended it.

The construction here declared "not for a moment to be supposed" is a construction not urged by the claimant here, declared incorrect by the Court of Claims in this case and overruled in principle by this court in a closely similar case.

If an army transport were sent from Pensacola to New

York, we can not believe that an army officer on it would receive increased pay under the act of 1901. That act, read as a whole, contemplates service elsewhere than in the United States, not a voyage between purely domestic points.

The claimant in his petition stated a claim for this increase while on the way from San Francisco to Puget Sound, but it was only urged provisionally by way of emphasizing another claim (see opinion of Court of Claims, rec. 11, and statement of case in opinion of this court, p. 1). The claim was rejected by the Court of Claims (rec. 24):

"This [increased pay], however, does not include the services rendered by the claimant in cruising along the Pacific coast between San Francisco and Bremerton."

The claimant admitted the correctness of this ruling by not appealing from it, although no evidence is needed that much of this voyage was over three miles off coast.

Thus the very "sweeping innovation" which is treated in the opinion of this court as a reason for denying the appellee's claim, has already been held to be outside the meaning of this statute.

This is exactly in accord with the decision of this court, written by the same learned Justice who writes the opinion in the present case, in *United States* v. *Hutchins* (151 U. S. 542). A naval officer traveling from San Francisco to New York by the Isthmus of Panama was allowed mileage because "traveling under orders in the United States" and not "traveling abroad." The first term is an almost exact antithesis to the term in the act of March 2, 1901,—"serving beyond the limits of the States."

The construction by Attorney-General Cushing cited in our brief, pp. 42, 43, of the like words "on the coast" supports the same view.

The Several Rates of Pay.

Adopting on the authority of that case the ruling of the Court of Claims on this point, the following results as the theory of the meaning of these statutes sustained by the court below :

(*a*) Officers on sea duty in bays, rivers and harbors of the United States or voyaging between domestic points receive ordinary army pay (enacting clause of § 13).

(*b*) Officers sent to foreign stations for either sea or land service receive ten per cent increase on this pay (enacting clause and 2d proviso of § 13 and act of March 2, 1901).

(*c*) Officers on shore duty in the United States receive fifteen per cent less than army pay (1st proviso of § 13).

The first class would include all officers on the North Atlantic and Pacific Squadrons while off the coasts of the United States and all officers on receiving and training ships. The second class would include those sent to the Asiatic, South American and European stations or other foreign points.

Surely this is no such absurd classification of naval officers for pay as to lead to denying to these acts an interpretation according to the natural meaning of their words. It is the same classification for the navy as provided by the statute for the army.

Result of Construction of Court Below.

This construction gives this increase of pay for the cause expressed in the statute, namely, that the officers go beyond the States.

This construction assimilates army and navy pay by giving to each branch ordinary pay for service at home and ten per cent increase for service abroad.

This construction rests on the best of reasons for in-

creased pay—increased expenses on foreign stations. That reason applies equally to army and navy officers.

The suggestion upon which this increase was granted was made in the report of the Adjutant-General for 1899, to the Congress which passed the two increase acts of 1900 and 1901. It is found in the Report of War Department, 1899, Vol. 1, Part 2, p. 32, under the head of "Pay and Rank of Officers":

"The pay of all officers below the grade of Brigadier-General should be increased at least 33⅓ per cent while on duty in Cuba or our new possessions. Most of the gentlemen have families that they are unable to have with them, and are therefore compelled to maintain two establishments—a difficult undertaking when the amount of their pay is considered. The increase would meet in a measure their actual living expenses. This legislation is urgently recommended."

This mentions only expenses, not hardships or tropical dangers, as the ground of the increase and gives a cause of expense applicable alike to foreign service of naval officers at sea and army officers on land.

This construction does not involve the idea, absent from the terms of the statute, of increased pay for "hardships." It has not been necessary or usual to increase the pay of our army or navy for hardships. Nor are hardships necessary incidents to service outside the United States. Diplomatic assignments in Europe, special duty on foreign inspection, duty in Hawaii or Porto Rico, in then peaceful Cuba and on a Pacific Ocean voyage involve no "hardships," although the army receives the increase for all these. But all foreign service involves both the army and the naval officer in the increased expense of maintaining himself away from home and his family at home.

This construction does not involve a "sweeping innovation" in the navy as compared to the army. In 1901

(see appellee's brief, pp. 28–32), two-thirds of the army officers, but only a little over a third of the naval officers would receive the increase upon this construction.

This construction, thus classifying naval officers for pay, is not necessarily wrong because the classification is new.

The army before 1899 received higher pay than the navy and succeeded in getting increased pay for foreign duty soon after such duty became general. Some increase for the army might have been anticipated from its past superiority in pay; and so § 13 of the act of 1899 not only corrected the past inequality in army and navy pay, but was made "prospective in its application to future legislation" (opinion, p. 2).

The navy for many years had been doing foreign service, without higher pay for this distant, always expensive, and sometimes disagreeable, duty. That the navy had not before the date of the Personnel Act received a higher rate of pay which was so early after its passage granted to the army is not a reason why the navy is not justly entitled to it. It is a reason for believing that the only way in which equal pay to the army and navy could be assured was by a statute requiring future assimilation. This is done by the construction of the Court of Claims, which gives the increase to all alike when on foreign service.

The construction adopted by this court contravenes a long-established principle in naval pay, by making shore pay higher than sea pay in the same vicinity. In *Rodgers* v. *United States* (185 U. S. 83, 92), the court held that another section of the Personnel Act (§ 7) must be construed in the light of "the general rule in respect to naval service of a difference between the pay of officers doing shore duty and of those at sea." Certainly no contrary presumption of an intent to give higher pay for shore than for sea duty is

warranted, in the absence of an express declaration by Congress to that effect. Yet, according to the decision just rendered, an officer of the navy on shore duty at the Cavite naval station will receive ten per cent more pay than his fellow officer of the same rank on sea duty in the adjacent waters of the harbor.

The construction of the court below recognizes that the "normal" duty of both army and naval officer is to go where his country's need sends him. When the act of 1899 was passed, both army and naval officers were engaged in both foreign and domestic service. The same pay was received for both kinds of service and both were normal to both classes of officers. The statute draws no line of pay between normal and abnormal duties; the line is between duties at home and abroad. If duty abroad deserves higher pay, it is due as much to the naval as to the army officer.

Naval officers' "normal duties" (opinion, p. 4) are as much ashore as at sea. The Navy Register of January, 1904, shows that the total sea service of each of twenty out of twenty-seven rear-admirals during his entire career has been less than his total shore service and that the sea service of every one of the twenty-seven is less than his shore service and his time unemployed. Naval officers by express enactment have fifteen per cent less than army officers on domestic shore service. Are they to have a second dissimilation, based on inference alone, when on foreign service?

No Contrary Statutes.

Two statutory provisions are referred to in the opinion of the court as supporting the free construction now sustained and forbidding the literal construction now overruled.

Second Proviso of Section 13.

The opinion says (pp. 3, 4, 5):

"Confirmation of this view is found in the second proviso of section 13, 'that when naval officers are *detailed for shore duty beyond seas* they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the army detailed for duty in similar places.' Here is a distinct recognition of the fact that when naval officers are detailed for a special or unusual duty beyond seas, they shall receive the same pay as army officers detailed for the same duties. This provision, however, would be wholly unnecessary if the act were given the broad application contended for, since the increased pay allowed to army officers for duty beyond seas would apply to naval officers, without a special proviso to that effect. * * *

"This construction would not only render nugatory and obsolete the proviso of the Personnel Act that officers to be entitled to army pay shall be detailed for shore duty. * * *

"In our opinion the proviso that naval officers shall be entitled to army pay 'when detailed for shore duty beyond seas,' is not repealed or rendered inoperative by anything contained in the acts of May 26, 1900, and March 2, 1901."

It is, with deference, suggested that the court overlooked (as did the Court of Claims on the first hearing) the opening clause of the Personnel Act, § 13, on which alone the claimant relies. That opening clause gives to naval officers "the same pay and allowances * * * as * * * provided * * * for the officers * * * in the army." Its first proviso says that when on shore they shall have "fifteen per centum less pay than when on sea duty." Its second proviso says that when "detailed for shore duty beyond seas, they shall receive the same pay and allowances as * * * officers of the army detailed for duty in similar places." The opening clause is the only provision governing pay while on sea duty.

The opening clause fixes their sea pay at army pay. The first proviso fixes their domestic shore pay at army pay, less fifteen per cent. The second proviso fixes their foreign shore pay at army pay. There was at that date no increase for foreign service in army or navy.

The opening clause and the second proviso make the same grant. The latter is expressed in greater detail. Both give to naval officers army pay. The first proviso reduces their army pay, when on shore. The second proviso restores the full army pay, if that shore duty is rendered beyond seas. Its object was not to give to naval officers on shore duty beyond seas any more pay than received at sea. It was to put them, if the shore duty is beyond seas, where they would have been without the first proviso.

The increase to army officers for foreign service was not granted at this time or even under consideration. Is it possible that the language quoted implies the supposition that at the date of the Personnel Act army officers abroad received some increased pay? The proviso must be construed in the light of the then existing law and not as if the later act had then been in force. Its only meaning is that officers on shore duty beyond seas shall not suffer the shore duty reduction, but shall recive army pay, as provided by the opening clause for officers not on shore.

Necessity for Second Proviso.

The first of these passages quoted contains at its close what appears to be a misapprehension as to this second proviso, probably affecting the general conclusion. The same idea is in the other passages. It says (p. 3):

"This provision [the second proviso], however, would be wholly unnecessary, if the act were given the broad

application contended for, since the increased pay allowed to army officers for duty beyond seas would apply to naval officers, without a special proviso to that effect."

This proviso is necessary under any construction, because without it, officers on shore duty beyond seas must have suffered the fifteen per cent reduction required by the first proviso for duty "on shore." Indeed, naval officers on duty in the Philippines were actually paid at the reduced rate, under the decision of the Comptroller that the Philippines were not "beyond seas," until the Court of Claims enforced the full rate (*Irwin* v. *United States*, 38 C. Cls. 87).

The Appropriations.

The opinion refers (p. 5) to later army and naval appropriation acts, as showing that the army acts appropriated for this increase while the naval acts did not. This omission is cited as showing what "Congress supposed" to be the law. The argument is itself advanced only as "lending support" to the preceding arguments.

The naval appropriation acts, we pointed out in our reply brief (pp. 3, 4), do not segregate items as do the army acts, but make a lump appropriation for all pay and allowances of officers and men of the navy. See 31 Stat. L. 684, 1107; 32 Stat. L. 662, 1177. No item for ten per cent increase would appear in the naval act. The argument, indeed, proves too much; for there is no appropriation for that ten per cent increase which the opinion declares to be due, namely, for shore duty beyond seas.

The lump sum appropriated by the naval appropriation act of June 7, 1900, for pay of officers and men of the navy (31 Stat. L. 684), was $12,810,897; by the act of March 3, 1901 (31 Stat. L. 1108), $15,200,284. It can not be said that an increase in pay estimated to amount

to within $125,000 a year (not exceeding 500 officers at $250 a year, see our brief, p. 31), is not included in this great increase of $2,389,387.

Another sufficient reason exists why no appropriation for this purpose should have been made. Appropriations are made by Congress in pursuance of departmental estimates. Estimates are based on the departmental construction of the statutes. The Comptroller of the Treasury having decided that this ten per cent increase was not applicable to naval officers, the departments would not estimate for the increased pay and Congress would not appropriate for it until the substantive right was finally determined by the courts. Then an estimate would be made, and an appropriation would follow. The omission to appropriate follows from the adverse decision of the Comptroller and the consequent failure to estimate for it. The substantive right is not affected by such decision or by the absence of an appropriation.

Colonel's and Captain's Pay.

Other passages of the opinion suggest that in the great complication of these statutes, counsel have failed to make all points of detail entirely clear to the court, and emphasize the propriety of a re-argument.

The opinion says (p. 2):

"It was, however, a source of dissatisfaction to navy officers that some of them did not receive the same pay as corresponding officers of the army, although others received a larger pay. Thus by sections 1261 and 1556 the highest pay of a rear-admiral, when at sea, was $6,000, while a major-general received $7,500, a commodore received $5,000 when at sea, while a brigadier-general received $5,500. A captain, however, when at sea received $4,500, while a colonel received but $3,500."

The pay of a colonel, $3,500 there stated, is the grade

pay of a colonel (Revised Statutes, § 1261). But every colonel in the army and every captain in the navy, including the claimant, is of over fifteen years' service and is entitled under Revised Statutes, §§ 1262 and 1267, to $4,500 a year, exactly the pay of a naval captain under Revised Statutes, § 1556. This grade is cited in the opinion as an instance of army pay being less than navy pay. Perhaps it was supposed that the appellee was receiving $4,500 as the pay of a captain under the old navy pay table and consequently could not claim ten per cent increase upon that pay.

The brief for the United States (top of page 8) was misleading in this particular, although its statements were corrected in our reply brief (pp. 1, 2).

In fact in the line of the navy old navy pay exceeds army pay in substantially but two cases:

	Navy pay.	*Army pay*
Lieutenant, junior grade, if less than 10 years in service	$1,800	$1,650
Lieutenant, if less than 20 years in service	$2,400	$2,340

If either had more service, the navy pay would not be higher and consequently he would draw army pay.

Addition of Fifteen Per Centum.

The opinion says (p. 5):

"This omission lends support to the theory that Congress supposed that the ordinary sea services of naval officers were sufficiently compensated by the addition of fifteen per centum to their shore pay."

Under the Personnel Act fifteen per cent is not added to shore pay to make sea pay. Sea pay is ascertained by finding the pay of an army officer. From that pay fifteen per cent is deducted to find shore pay. Is it possible that it was in the mind of the court that naval officers receive army pay on shore and fifteen per cent additional when at sea?

No Limitation on Powers of Congress.

The opinion says (p. 3):

"It never could have been the intention of Congress to disable itself from awarding to a particular class of army officers an increase of pay for exceptional services without thereby increasing the pay of navy officers, whose lives are largely passed in performing like services."

The appellee contends that the act of 1899 explicitly declares that when Congress awards to army officers an increase of pay, the grant inures to naval officers by the assimilating clause of the Navy Personnel Act. But Congress is not disabled from providing otherwise by expressly excluding them. Here the intent of Congress expressed in the act of 1899 controls, because it is not otherwise provided in the act of 1901.

"General Pay" in the Army.

At the bottom of page 2 and top of page 3, reference is made to the "general pay of army officers" as fixed by Revised Statutes, § 1261. No army officer receives as his total pay the "general pay" provided by this section, except a second lieutenant, and he usually for only a brief period, since all enlisted, cadet and commissioned service counts for longevity under § 1262, Revised Statutes.

Pay of army officers as now received consists of grade pay, § 1261, longevity pay, § 1262, and foreign service pay, act of March 2, 1901, and certain special rates for particular duty, such as aid's pay (*Crosley* v. *United States*, 38 C. Cls. 82; Revised Statutes, § 1261), or higher command pay, act of April 26, 1898, § 7, 30 Stat. L. 365 (10 Comp. Dec. 123). If naval officers are to be on an equality with army officers they must be entitled to these increases whether for longevity or for foreign service or for like

special duty as well as the "general pay" (grade pay) under Revised Statutes, § 1261.

Is there not some inconsistency between the objection that this increase is not "general pay" (although when passed two-thirds of the army received it, appellee's brief, p. 29), and the term "sweeping innovation" (opinion, p. 4) when applied to the navy where a smaller proportion would receive it (appellee's brief, pp. 30, 31)?

Uniformity in Interpretation.

Many of the interested persons are the same in this case as in *Dewey* v. *United States*, 178 U. S. 510, and *Gibson* v. *United States*, 194 U. S. 182. In the *Dewey* case, this court adhered in a very forcible statement of its views to a literal interpretation of the naval bounty act, although it was clear that a liberal construction would have supported the general spirit and purpose of the act. In the *Gibson* case, this court refused the old naval sea ration to naval officers because the terms of the act literally enforced forbade its continuance, although the ration still remained equally appropriate to naval sea duty. Here the appellee is literally within the words of the acts; but his claim is rejected on the very broad doctrine of construction that "it is not for a moment to be supposed that Congress contemplated any such sweeping innovation." Are not these officers right in thinking that equal justice requires the will of Congress to be ascertained here as in the other cases from "the words Congress has chosen to employ" (178 U. S. 520)?

Change of Opinion Below.

When the Court of Claims first heard this case, it was decided adversely, even after unlimited oral argument. Upon more elaborate study of the acts, themselves of

great intricacy, and upon further argument and reflection, the Court of Claims admitted its misapprehension of the grounds of the claim and decided that its first decision was erroneous. This indicates the complexity of the subject-matter, even to a court whose duties are largely to decide statutory questions relating to pay of United States officers. This fact emphasizes the value of re-argument and review in this very case.

Conclusion.

The question affects a considerable number of a class deserving well of their country. It is respectfully submitted that we have pointed out potent reasons for fearing that in the present condition of the record their rights are concluded without a complete apprehension of the merits of their claim.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Appellee.

Certificate.

The undersigned counsel for appellee hereby certify that in their opinion the grounds stated in the foregoing petition and in the accompanying brief are valid grounds in law for a rehearing of this case.

GEORGE A. KING,
WILLIAM B. KING,
Counsel for Appellee.

Supreme Court of the United States.

Nos. 94 and 95.—October Term, 1904.

94	The United States, Appellant, vs. Charles M. Thomas.	Appeals from the Court of Claims.
95	Charles M. Thomas, Appellant, vs. The United States.	

[December 5, 1904.]

This was a petition for certain allowances claimed to be due petitioner as a captain in the United States Navy, under act of March 3, 1899, (30 Stat. 1007,) equalizing the pay of army and navy officers, and known as the Navy Personnel Act. The findings of fact are too long to be here reproduced, but the several items claimed by petitioner, and from the disposition of which these appeals are taken, are cited by counsel in their brief and by the Court of Claims as follows:

1. From May 26, 1900, to March 1, 1901, he was paid sea pay of a captain, at $4,500 a year, and claims ten per cent increase of this pay for service in the Philippines and in China, under the acts of May 26, 1900, and March 2, 1901. (31 Stat. 211, 903.)

2. From March 2, 1901, to June 11, 1901, he was paid the sea pay of a captain, $4,500 a year, and claims ten per cent increase of this pay for service outside the United States, under the provisions of the act of March 2, 1901. (31 Stat. 903.)

3. From June 12, 1901, to September 30, 1901, he was paid sea pay at $4,500 a year, and claims ten per cent increase under the act of March 2, 1901, for service outside the United States. During this time he was in the waters of the San Francisco Bay, traveling from San Francisco to Puget Sound, and in the waters of Puget Sound. This claim is made provisionally in case his service in Chinese and Philippine waters is not considered to be service "in China" and "in the Philippine Islands," entitling him to ten per cent increase from May 26, 1900, to March 1, 1901. In that event he would claim that his service in waters of the United States was beyond the limits of the States comprising the Union.

4. Between December 2, 1899, when relieved as commanding officer of the U. S. S. Lancaster, and ordered to report to the Navy Department, and

February 7, 1900, when he took command of the U. S. S. Baltimore at Hong Kong, China, he was paid only shore pay, $3,825 a year, fifteen per cent less than sea pay. He claims sea pay, $4,500 a year during that time.

The last item was disallowed. The first three items were at first disallowed, but on a rehearing were allowed and final judgment rendered for $568.29. (38 Ct. of Clms. 113, 719.) Both parties appealed to this court.

Mr. Justice BROWN delivered the opinion of the Court.

This case depends upon the construction given to section 13 of the Navy Personnel Act, declaring that "after June 30, 1899, commissioned officers of the line of the navy and of the medical and pay corps shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for officers of corresponding rank in the army." The object of this act can best be understood by considering the prior legislation of Congress upon the same general subject, and the circumstances under which the act was passed. By the act of July 16, 1862, (R. S. section 1466,) the relative rank of army and navy officers was fixed by declaring that rear admirals shall rank with major generals, commodores with brigadier generals, captains with colonels, commanders with lieutenant colonels, lieutenant commanders with majors, lieutenants with captains, etc.

It was, however, a source of dissatisfaction to navy officers that some of them did not receive the same pay as corresponding officers of the army, although others received a larger pay. Thus by sections 1261 and 1556 the highest pay of a rear admiral, when at sea, was $6,000, while a major general received $7,500, a commodore received $5,000 when at sea, while a brigadier general received $5,500. A captain, however, when at sea received $4,500, while a colonel received but $3,500,

To remove this dissatisfaction Congress passed the Naval Personnel Act, assimilating the pay of navy officers to army officers of corresponding rank, with a proviso, however, "that no provision of this act shall operate to reduce the present pay of any commissioned officer now in the navy; and in any case in which the pay of such an officer would otherwise be reduced he shall continue to receive pay according to existing law."

The effect of this legislation was to raise the pay of certain navy officers to that received by army officers of corresponding rank, and to leave undisturbed the present pay of certain other navy officers, who were already receiving higher pay than army officers of the same rank.

The intention of Congress was evidently to put officers of the army and navy on the same footing with respect to their general pay, and to make the act prospective in its application to future legislation, so that if Con-

gress should thereafter raise the general pay of army officers as fixed by Revised Statutes, section 1261, a like increase should apply to navy officers It does not, however follow, that Congress may not increase the pay of army officers for services in particular places or under special circumstances, without thereby intending that the same increase shall apply to naval officers performing the same service under like circumstances. Thus, if the act should allow army officers increased pay when ordered to sea or to a foreign port, it would not follow that naval officers would be entitled to a like increase, since such service would be wholly exceptional in the case of army officers, while it is the natural and normal duty of navy officers to engage in sea service, cruise in foreign waters and lie up in foreign ports. It never could have been the intention of Congress to disable itself from awarding to a particular class of army officers an increase of pay for exceptional services without thereby increasing the pay of navy officers, whose lives are largely passed in performing like services.

Confirmation of this view is found in the second proviso of section 13, "that when naval officers are *detailed for shore duty beyond seas* they shall receive the same pay and allowances as are or may be provided by or in pursuance of law for officers of the army detailed for duty in similar places." Here is a distinct recognition of the fact that when naval officers are detailed for a special or unusual duty beyond seas, they shall receive the same pay as army officers detailed for the same duties. This provision, however, would be wholly unnecessary if the act were given the broad application contended for, since the increased pay allowed to army officers for duty beyond seas would apply to naval officers, without a special proviso to that effect. Shore duty beyond seas being an exceptional duty, both to officers of the army and navy, and being probably attended by increased expenditures, and dangers incident to a tropical climate, it is very natural that Congress should award them both increased compensation.

The principal questions in this case, however, arise from the army appropriation bills of May 26, 1900, and March 2, 1901, making appropriation for the support of the army for the year ending June 30, 1901, and 1902, the first of which contains the following proviso:

"*Provided*, That hereafter the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the Territory of Alaska, shall be increased ten per cent for officers and twenty per cent for enlisted men, over and above the rates of pay proper as fixed by law in time of peace." (31 Stat. 211.)

Here is an increase of ten per cent allowed to army officers serving in certain designated places. Doubtless if naval officers were detailed for shore duty in any of these islands they would receive a like increase of pay, under the proviso of section 13 of the personnel act heretofore quoted.

But, unless they are detailed for shore duty, it is impossible to hold that they are entitled to extra pay, without treating as obsolete the above proviso requiring such detail.

The act of March 2, 1901, (31 Stat. 903,) making appropriation for the support of the army for the fiscal year ending June 30, 1903, contains the following proviso:

"*Provided*, That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the States, comprising the Union and the territories of the United States contiguous thereto, shall be increased ten per cent for officers and twenty per cent for enlisted men, over and above the rates of pay proper as fixed by law for time of peace, and *the time of such service shall be counted from the date of departure from said States to the date of return thereto:*

"*Provided further*, That the officers and enlisted men who have served in China at any time since the 26th day of May, 1900, shall be allowed and paid for such service the same increase of pay proper as is herein provided for."

Under this proviso an army officer ordered to the Philippine Islands receives an increase of pay from the day he leaves San Francisco until he returns there. This allowance was undoubtedly based upon the consideration that service both in the Philippines themselves and upon the voyage going and returning, was an exceptional service, attended by peculiar hardships; but to say that navy officers shall be entitled to the same increase is practically to add ten per cent to their sea pay from the moment they leave a port of the United States until they return thereto; in other words, to increase their normal sea pay ten per cent whenever they are serving beyond the limits of the States.

So far as applied to naval officers, it goes further than this. The act of 1901 does not, as did the act of 1900, limit the increase of pay to officers serving in our island possessions and in Alaska, but extends it to all serving "beyond the limits of the United States," so that if applied to naval officers, whenever a vessel is ordered to sea beyond the three-mile limit, be it only upon a practice cruise or a voyage from Pensacola to New York, every officer on such vessel is entitled to a ten per cent increase of his ordinary pay from the day he sets sail until the day he returns.

It is not for a moment to be supposed that Congress contemplated any such sweeping innovation. This construction would not only render nugatory and obsolete the proviso of the personnel act that officers to be entitled to army pay shall be detailed for shore duty, but largely discriminates in favor of naval officers by adding ten per cent to their pay for their normal sea duties without a corresponding addition to the pay of army officers for the performance of *their* normal duties which are upon land; in other words, instead of assimilating the pay of army and naval officers, it actually dissimilates them.

In our opinion the proviso that naval officers shall be entitled to army pay "when detailed for shore duty beyond seas," is not repealed or rendered inoperative by anything contained in the acts of May 26, 1900, and March 2, 1901, and that naval officers are not entitled to an increase of pay while discharging their ordinary sea duties.

It is significant in this connection to notice that in the appropriation act of March 2, 1901 for the support of the army for the fiscal year of 1902, there was an item of $500,000, for "an additional ten per centum increase on the pay of officers serving at foreign stations." (31 Stat. 903.) This was followed by a similar provision in the appropriation act of June 30, 1902 for the year of 1903, the amount appropriated being $451,456, (32 Stat. 507–512,) and in the army appropriation act of March 2, 1903, for the year 1904, there was also an item of $200,000, for the same purpose. (32 Stat. 933.) So also in the appropriation act of April 23, 1904, (33 Stat. 259–266,) for the year 1905, there is an item for an additional ten per centum increase on the pay of commissioned officers serving in the Philippine Islands, the island of Guam, Alaska, China and Panama of $167,426.30.

Notwithstanding these repeated provisions for the increase of army pay, Congress has never made an appropriation for the largely increased pay to which naval officers would be entitled under the acts of 1900 and 1901, or otherwise recognized their claim for increased pay to which such officers would be entitled upon the theory of the petitioner in this case. This omission lends support to the theory that Congress supposed that the ordinary sea services of naval officers were sufficiently compensated by the addition of fifteen per centum to their shore pay.

2. Different considerations apply to the claim of petitioner to sea pay from December 2, 1899, to February 7, 1900. Claimant was relieved as commanding officer of the Lancaster, then at Barbadoes, December 2, 1899, and ordered to report to the Navy Department, where he arrived, by merchant steamer, December 12, 1899. Upon the following day he was ordered to proceed to Hong Kong for duty on the Asiatic station, and sailed by merchant steamer from San Francisco, January 6, 1900. He reported in obedience to his orders, and was assigned to the command of the Baltimore at Hong Kong, February 7, 1900. Between December 2, 1899, and February 7, 1900, petitioner was occupied in traveling on duty, partly on merchant steamer and partly on land, and in reporting to the Navy Department. During this time his pay was reduced fifteen per cent from the regular sea pay, in accordance with the first proviso of the personnel act, which declares that "such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty."

The order detaching him from the Lancaster was as follows:

"SIR: You are hereby detached from duty in command of the U. S. T. S. Lancaster, will proceed immediately to Washington, D. C., and report at the Navy Department, at that place, for special temporary duty.

"Hold yourself in readiness for orders to sea duty.

"This employment on shore duty is required by the public interest.

Respectfully,

(Sgd.) A. S. CROWNINSHIELD,
Acting Secretary.

Captain CHARLES M. THOMAS, U. S. N.,
U. S. T. S. Lancaster."

The next day, after reporting to the Navy Department under this order, he was ordered to proceed to San Francisco, California, and thence to Hong Kong. It thus appears that while he was not regularly detailed for shore duty, he was ordered to report at the Navy Department for a special temporary duty, and the final sentence of the letter indicates that it was regarded as an employment on shore duty. He was allowed by the Department fifty dollars travelling expenses from Barbadoes to New York, but was not allowed either mileage or sea pay. The Court of Claims, however, allowed him mileage under section 13 of the Navy Personnel Act, and a clause of the Army Appropriation Act of March 3, 1899, (30 Stat. 1064, 1068,) providing "that hereafter the maximum sum to be allowed and paid any officer of the army shall be seven cents per mile, distances to be computed over the shortest usually travelled routes;" but mileage seems not to have been claimed for his travelling from Washington to Hong Kong, by reason of the further provision of the same act "that actual expenses only shall be paid to officers when travelling to and from our island possessions in the Atlantic and Pacific Oceans." The Government apparently acquiesced in this allowance of mileage, as it made no appeal therefrom.

But the Court of Claims further held that, under R. S. section 1571, he was not entitled to sea pay, because, by that section "no service shall be regarded as sea service except such as shall be performed at sea, under the orders of a department and in vessels employed by authority of law."

This construction must necessarily be correct, unless we are prepared to hold that a steamer upon which a naval officer takes passage under the orders of the department is a "vessel employed by authority of law." Obviously, it does not admit of this construction. A person who takes passage upon a steamer or a seat in a railway carriage does not "employ" such steamer or carriage in any just sense. We think the term "vessels employed by authority of law" is restricted to vessels owned or chartered by the Government, or otherwise engaged in the service of the United States.

Sea duty being duty at sea upon such vessels, an allowance for mileage is obviously inconsistent with such duty, as the pay of the officer necessarily includes travel upon such vessels; while it is appropriate to shore

duty, since travel upon such duty is performed either upon land or upon vessels not engaged in Government service.

There is nothing in the Navy Personnel Act inconsistent with or repealing R. S. section 1571, and the case of *Gibson* v. *United States*, (194 U. S. 182,) is not in point. In that case it was held that the personnel act did repeal sections 1578 and 1585, allowing sea rations, because the later act covered the same subject and superseded the provisions of those sections. There is no such conflict between section 1571 and the personnel act.

The ruling of the Court of Claims in this last particular was correct; but for the error in the previous ruling the decree must be

Reversed.